Title Counter-terrorist hybrid orders and the right to a fair trial: the perpetual quasi-emergency

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COUNTER-TERRORIST HYBRID ORDERS AND THE RIGHT TO A FAIR TRIAL:

THE PERPETUAL QUASI-EMERGENCY

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Abstract

This thesis examines a number of closely connected counter-terrorist executive mechanisms in the United Kingdom (UK) and the manner in which they are administered, in order to evaluate the implications of the mechanisms for, and ultimately their compatibility with, the right to a fair trial under international human rights law (IHRL). More specifically, this study critically analyses Control Orders, Terrorism Prevention and Investigation Measures (TPIMs), and Temporary Exclusion Orders (TEOs). For reasons made clear in this thesis, these mechanisms are termed 'counter-terrorist hybrid orders' and are collectively analysed as such. As the study identifies a number of issues pertaining to the current design and administration of these mechanisms that can adversely affect the right to a fair trial, the thesis argues that they should be substantially reformed to make them more consistent with IHRL fair trial standards.

Moreover, the thesis examines how these mechanisms, as they are currently designed and administered, have been accepted in a legal system with a recognised and long-established attachment to upholding high human rights standards. Having identified, generated and analysed a substantial body of research to perform this task, the thesis argues that the acceptance of the mechanisms as they are currently administered may have occurred as a result of the establishment of a state of 'perpetual quasi-emergency'. This denotes a particular legal phenomenon in which the UK has responded to an evolving legal problem, namely, how to deal with terror suspects who cannot be prosecuted, deported, or indefinitely detained, in a manner that, whilst being grounded in law, actually resembles the behaviour of States enduring 'prolonged emergencies'. The thesis asserts that the state of perpetual quasi-emergency, which creates the space necessary for the acceptance of these mechanisms, was established and is preserved by a number of legal and extra-legal factors. As such, some of the research, analysis and methods used to evaluate the phenomena in this study represents an original contribution to knowledge.

This study encompasses a variety of approaches in order to examine a particular type of counter-terrorist power, the implications of these mechanisms for the right to a fair trial under IHRL, and the relationships between these issues and wider society. The study requires traditional doctrinal analysis when exploring what the right to a fair trial in the context of national security entails, and in order to examine the various counter-terrorist hybrid order regimes in light of this framework. When assessing what factors may play a role in the establishment and preservation of the state of perpetual quasi-emergency, the study necessitates methods which are less doctrinal and more socio-legal in nature.

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Publications and Presentations

Publications

‘Counter-Terrorism and the Prospects of Human Rights: Securitizing Difference and Dissent’ (2017) 22(5) *European Human Rights Law Review* 525 (Book review)

‘The Complexities of Contemporary Terrorism Trials Laid Bare’ (2017) 181(33) *Criminal Law and Justice Weekly* 594

‘Once More unto the Breach: The Deployment of British Soldiers Overseas and the UK’s Human Rights Obligations’ (2017) 22(1) *Coventry Law Journal* 80

‘To Helmand and Back’ (2017) 181(19) *Criminal Law and Justice Weekly* 322

(with Y. Ahmed) ‘The Prevent Strategy: The Human Rights Implications of the United Kingdom’s Counter-Radicalisation Policy’ (2016) 24 *Questions of International Law* 35

(with A. Yiannaros and C. Nyombi) 'TTIP Negotiations in the Shadow of Human Rights and Democratic Values' (2016) 27(9) *International Company and Commercial Law Review* 316

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‘The Reporting of Terrorism and the Proliferation of Theatrics’, *London Conference in Critical Thought*, London South Bank University (29-30 June 2017)

‘The Media Reaction to the Brexit High Court Ruling: The Good, the Bad, and the Ugly’, CRiL Rapid Reaction Roundtable, University of Bedfordshire (16 October 2016)

‘"Taking Blind Shots at a Hidden Target”: Assessing the Implications and Justifications of Closed Material Procedures’, *Law and Culture Conference: (In)visibility*, St Mary’s University (5-6 September 2016)

'The Erosion of the Right to a Fair Trial in Post-9/11 Counter-Terrorism: A Theatricalistic Perspective', *Human Rights Research Students' Conference*, University of Essex (8 July 2015)

'Counter-Terrorism and the State of Perpetual Quasi-Emergency', *CRiL Research Seminar*, University of Bedfordshire (15 April 2015)

'The "War on Terror": The State of Permanent Legal Emergency and Human Rights', *Edinburgh Postgraduate Law Conference 2014*, *Innovation in the Law: New Challenges, New Perspectives* (1-2 December 2014)

'Terror on our Screens: The Common Interest of Theatrical Terrorism', *Vox-Pol Conference*, *Violent Online Political Extremism: Setting a Research Agenda* (28-29 August 2014)

'The Indispensability of Interdisciplinarity', *CRiL Research Students Workshop*, University of Bedfordshire (10 July 2014)

'The "Theatricalisation" of Terrorism – What, Who and Why?', *Greek Politics Specialist Group*, *Workshop on Political Violence, Terrorism and Extremism in Greece and Europe* (20 June 2014)

'Trial Results without Trial Protections - The Circumventing of the Presumption of Innocence in 21st Century Counter Terrorism', *Newcastle Law School PGR Conference 2014, The Challenges for Legal Thought in a Contemporary Society* (3-4 April 2014)

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List of Abbreviations

7/7	The terrorist attacks in London on 7 July 2005
9/11	The terrorist attacks against the USA on 11 September 2001
ASBO	Anti-Social Behaviour Order
ATCS Act 2001	Anti-Terrorism, Crime and Security Act 2001
CLS	Critical Legal Studies
CMP	Closed Material Procedures
CPR	Civil Procedure Rules
CTS	Critical Terrorism Studies
CTS Act 2015	Counter-Terrorism and Security Act 2015
DPP	Director of Public Prosecutions
EU	European Union
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
HRA 1998	Human Rights Act 1998
HRC	United Nations Human Rights Committee
IComJ	International Commission of Jurists
ICCPR	International Covenant on Civil and Political Rights
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IRA	Irish Republican Army

IRTL	Independent Reviewer of Terrorism Legislation
ISIL / ISIS	The Islamic State in the Levant / The Islamic State in Syria / Daesh
JCHR	Joint Committee on Human Rights
JSA 2013	Justice and Security Act 2013
PTA 2005	Prevention of Terrorism Act 2005
SIAC	Special Immigration Appeals Commission
SSHD	Secretary of State for the Home Department
TEO	Temporary Exclusion Order
TPIM	Terrorism Prevention and Investigation Measures
TPIM Act 2011	Terrorism Prevention and Investigation Measures Act 2011
UK	United Kingdom
UN	United Nations
USA	United States of America

Declaration

I, Ben Stanford, declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

Thesis Title:

Counter-Terrorist Hybrid Orders and the Right to a Fair Trial: The Perpetual Quasi-Emergency

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;

2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

3. Where I have cited the published work of others, this is always clearly attributed;

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5. I have acknowledged all main sources of help;

6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

7. Either none of this work has been published before submission, or parts of this work have been published as indicated.

Name of candidate: Ben Stanford Signature: 

Date: 20 November 2017

Chapter 1. Preliminary Matters

1.1 Rationale and Background to the Study

This thesis examines the development, implementation and administration of what are termed 'counter-terrorist hybrid orders', namely, Control Orders, Terrorism Prevention and Investigation Measures (TPIMs), and Temporary Exclusion Orders (TEOs), in order to evaluate the implications of the mechanisms for, and ultimately their compatibility with, the right to a fair trial under international human rights law (IHRL). This thesis argues that the design and administration of these mechanisms should be reformed as the current framework operates at the margins of IHRL, and that this has in fact adversely affected certain fair trial guarantees in a manner akin to that normally witnessed in States enduring a prolonged emergency. As such, this study analyses what factors may have contributed to the establishment and preservation in the UK of what this thesis argues is a state of 'perpetual quasi-emergency'.

Before turning to these issues, it is important to acknowledge that the UK provides a particularly compelling legal, historical and socio-political environment for the foundation of a doctoral research project which focusses on matters of counter-terrorism and the right to a fair trial under IHRL. This opening section briefly explores this background, demonstrating in the process how the scope and aims of this study are justified.

The first reason for the focus of this study concerns the unique historical experience the UK has in countering terrorism. The roots of some of the most controversial issues in contemporary counter-terrorism policies can be traced back to the British Government's struggle in the 20th century to contain and defeat Northern Irish-related domestic terrorism. One of the most notorious counter-terrorist policies employed by the British Government was

the use of certain interrogation methods, known as the 'Five Techniques',[1] against Irish Republican Army (IRA) suspects during 'the Troubles'. The European Court of Human Rights (ECtHR) held that these methods fell short of the torture threshold under Article 3 of the European Convention on Human Rights (ECHR), but instead amounted to inhuman and degrading treatment.[2] This judgment has had repercussions in the so-called 'War on Terror' waged by the United States of America (USA), where certain officials relied upon the decision to argue that 'Enhanced Interrogation Techniques' did not amount to torture.[3] Moreover, a recent high-profile public inquiry in the UK found that certain members of the British Armed Forces had applied the 'Five Techniques' during the course of detainee interrogation in the Iraq War,[4] despite the fact they had been banned decades earlier.[5]

For the purposes of this study however, many aspects of recent counter-terrorism practices in the UK find some of their roots in the same domestic conflict, namely, the use of executive detention and exclusion orders which significantly restricted the liberty of terror suspects.[6]

Firstly, the preventative arrest and detention of terrorist suspects in Northern Ireland, widely referred to as 'internment', was an extremely controversial executive measure exercised during the worst periods of the conflict. During the 1970s, several thousand individuals,

[1] These methods entailed wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.
[2] *Ireland v. UK* (App. no. 5310/71) ECtHR, 18 January 1978; European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; in force 3 September 1953) ETS No. 5 (the 'ECHR').
[3] See the correspondence by *inter alia* the Deputy Assistant Attorney General John Yoo, Assistant Attorney General Jay S. Bybee, Secretary of Defense Donald Rumsfeld and President George W. Bush (the 'Torture Memos'). In particular see Memorandum for Alberto R. Gonzales, Counsel to the President from Jay S. Bybee, Assistant Attorney General, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (1 August 2002).
[4] The Report of the Baha Mousa Inquiry HC (2011) 1452-I.
[5] In *Ireland v. UK* (n. 2), the ECtHR noted: 'At the hearing…the United Kingdom Attorney-General made the following declaration: "The Government of the United Kingdom have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3…of the Convention. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation".' (para 102).
[6] The Independent Reviewer of Terrorism Legislation (IRTL) has remarked: 'Preventative restraints for counter-terrorism purposes had precursors in a series of colonial and wartime measures providing for executive detention, in the power to intern IRA suspects which remained on the statute book until the end of the 20th century, and in the exclusion order regime'. See D. Anderson, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (March 2012) para 2.3.

predominantly Catholic nationalists, were arrested and detained without charge. In Operation Demetrius in August 1971, 342 IRA suspects were interned, all of whom were Irish nationalists. On several occasions during the Troubles, the British Government declared a state of emergency and derogated from (i.e. temporarily suspended) certain aspects of its international obligations in order to detain terrorist suspects indefinitely.[7]

Secondly, a variety of executive exclusionary powers, known as Exclusion Orders, were imposed on terrorist suspects through a succession of complex temporary laws, beginning with the Prevention of Terrorism (Temporary Provisions) Act 1974, which was renewed and amended until its eventual repeal in 1998.[8] Crucially, the Home Secretary could exclude terror suspects from entering the UK and could remove such individuals from Great Britain.[9] In 1976, a similar exclusionary power was conferred upon the Secretary of State for Northern Ireland in respect of Northern Irish territory.[10] Terrorist suspects could also be excluded from the UK altogether.[11] Moreover, any individuals who breached the terms of their Exclusion Order could face a substantial prison sentence.[12] As such, by the time of the attacks against the USA on 11 September 2001 (9/11), and the purportedly heightened threat from international terrorism that has endured ever since, the UK had amassed much experience in matters of counter-terrorism.

The second reason for the focus of this study relates to the UK's historical and enduring global influence over the development of the right to a fair trial. This is partly due to the pervasiveness of the common law, but also because of a number of major legislative developments. The conceptual origins of the right to a fair trial are often traced back to Clauses 39 and 40 of Magna Carta 1215 which provided the foundations of habeas corpus

[7] Several complaints were heard by the ECtHR which considered the legality of the UK's derogations. See *Brannigan and McBride v. UK* (App. nos. 14553/89; 14554/89) ECtHR, 25 May 1993.
[8] See the Prevention of Terrorism (Temporary Provisions) Acts in 1976, 1984 and 1989, and the Prevention of Terrorism (Additional Powers) Act 1996. Certain aspects of the legislation were permanently implemented with the Terrorism Act 2000.
[9] Prevention of Terrorism (Temporary Provisions) Act 1974, ss. 5-6.
[10] Prevention of Terrorism (Temporary Provisions) Act 1976, s. 6(1).
[11] Prevention of Terrorism (Temporary Provisions) Act 1989, s. 7(1).
[12] Prevention of Terrorism (Temporary Provisions) Act 1974, s. 3(8).

and access to justice.[13] Even though the rights enshrined in Magna Carta were only granted to noblemen, and despite the King's commitment to the Charter fading soon after, its enactment nevertheless represented the first time that the English monarch had limited his power and granted rights to justice by law.[14] It would, however, be several centuries before the writ of habeas corpus was fully codified in law with the Habeas Corpus Act 1679.

Ten years later, the Bill of Rights 1689 represented a significant milestone in the shaping of the contemporary notion of the right to a fair trial. Although most associated with parliamentary matters, Articles 10 and 11 of the Bill provided respectively that excessive bails and fines should not be imposed, and cruel and unusual punishments should not be inflicted; and that jurors ought to be duly impanelled and returned. Furthermore, the Act of Settlement 1701 established that High Court judges and Lords Justice of Appeal would hold office during good behaviour and could only be removed pursuant to an appropriate and formal mechanism.

The UK's IHRL obligations, including the right to a fair trial, are primarily set out in the ECHR, the drafting of which was heavily influenced by British lawyers such as David Maxwell Fyfe. Crucially, Fyfe served as a rapporteur on the International Juridical Section of the European Movement which was tasked with preparing the initial draft of the ECHR although, ultimately, this did not contain a provision that 'in any way resembles the fair trial guarantees' set out in Article 6 of the ECHR.[15] Instead, a Committee of Experts prepared a fair trial provision, and the final draft of Article 6 was based upon a draft text proposed by the UK.[16] The UK's commitment to the first binding international human rights instrument was

[13] Although originally listing 63 clauses, only four clauses of Magna Carta 1215 remain in effect today, two of which concern habeas corpus and access to justice.
[14] Several scholars published books to coincide with the 800th anniversary of Magna Carta. See F. Klug, *A Magna Carta for All Humanity: Homing in on Human Rights* (Routledge, 2015); R. Griffiths-Jones & M. Hill (eds) *Magna Carta, Religion and the Rule of Law* (CUP, 2015).
[15] W. Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2015) 55 & 267.
[16] ibid, 266-270.

further reinforced when it became the first State to ratify the ECHR on 8 March 1951.[17] Similarly, the UK demonstrated important leadership in the drafting of the International Covenant on Civil and Political Rights (ICCPR).[18] The UK was one of eight members of the Drafting Committee of the Commission on Human Rights which began to draft the ICCPR in June 1947, whose discussions were in turn partly based on a draft convention provided by the UK.[19]

Several decades later, the ECHR was incorporated into UK domestic law via the Human Rights Act (HRA) 1998 in accordance with the Labour Party's 1997 manifesto pledge to 'Bring Rights Home'.[20] With this landmark legislation, public authorities are prohibited from acting in a way that is incompatible with Convention rights and, crucially, individuals in the UK can enforce their Convention rights in the domestic courts rather than having to apply to the ECtHR or rely upon a concoction of common law principles and statutory rights spanning several centuries.[21]

Despite the strong and enduring influence the UK has manifested over the development of the right to a fair trial at the international level, there was great concern amongst human rights advocates that these commitments might wane after 9/11. Although the right to a fair trial represents 'a cardinal requirement of the rule of law' according to one of the most senior judges in recent years,[22] the effect that 9/11 has had upon human rights protection in the UK cannot be understated. The gradual deterioration of many fair trial guarantees and the apparent acquiescence of the courts and public has been a major cause for concern, and is one of the central issues of this study.

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[17] Council of Europe, Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=pNwJKz3Q.
[18] International Covenant on Civil and Political Rights (GA Res. 2200A XXI, 16 December 1966; in force 23 March 1976) 999 UNTS 171 (the 'ICCPR').
[19] M. J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987) xix.
[20] Labour Party, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law* (London, Labour Party, 1996).
[21] See, respectively, HRA 1998, ss. 6 & 3.
[22] T. Bingham, *The Rule of Law* (Penguin, 2011) 90.

In that regard, the third reason why the UK offers a particularly interesting environment for this study relates to the diverging approaches that the governments of the USA and UK took to combating terrorism in the aftermath of 9/11, whilst having to contend with their IHRL obligations.

The Bush Administration's counter-terrorism policy was grounded in a war paradigm, massively restricting or even rejecting the applicability of human rights norms for certain categories of people. In the immediate aftermath of 9/11, and for the first time on 16 September 2001, the Bush Administration quickly construed the subsequent counter-terrorist campaign into what became known as the 'War on Terror'.[23] Soon after, President George Bush declared that the 'War on Terror' had begun and would not end until every terrorist group in the world had been defeated.[24] In essence, the USA maintained that this 'war' was a genuine armed conflict under international humanitarian law (IHL), that IHL would therefore govern the conflict, and that the USA's IHRL obligations would not apply extraterritorially.[25]

Although the UK did not ultimately pursue this approach after 9/11, it initially seemed that prominent British politicians were attempting to align the UK's position with that of the USA. When asked about the existence of a 'war on terrorism' on 16 September 2001, the Prime

[23] President Bush remarked in a question and answer session: 'This crusade, this war on terrorism is going to take a while'. See President G. Bush, Remarks by the President upon Arrival, Office of the Press Secretary of the White House (16 September 2001).
[24] President G. Bush, Address to a Joint Session of Congress and the American People (20 September 2001).
[25] For some of the most significant policy responses of the American Government see: President G. Bush, Military Order of November 13 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. 66 Fed. Reg. 57833 (Nov. 16, 2001); US Department of Justice, Office of the Assistant Attorney-General, Memorandum for Alberto R Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense, 'Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees', 22 January 2002 at http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf; US Department of Justice, Office of the Attorney-General, Letter from U.S. Attorney General John Ashcroft to President George W. Bush on the status of Taliban detainees under the Geneva Convention, 1 February 2002 at http://www.npr.org/documents/2004/doj_prisoners/020102_letter.pdf; President G. Bush, Memorandum on Humane Treatment of Taliban and al Qaeda Detainees, 7 February 2002; US Department of Defense, Military Commission Order No. 1, 21 March 2002; Military Commissions Act of 2006, Public Law 109-366 (10/17/2006).

Minister, Tony Blair, appeared to agree with President Bush, stating that '[w]hatever the technical or legal issues about a declaration of war, the fact is we are at war with terrorism'.[26]

However, the war-grounded approach that had taken root in American political and legal discourse just days after 9/11 did not endure in the UK. Notwithstanding an active and leading role in the invasion of Afghanistan in 2001 and alleged complicity in the American-led extraordinary rendition programme,[27] initial rhetoric grounded in war swiftly reverted back to rhetoric grounded in law, which entailed respect for the rule of law and the UK's IHRL obligations.[28]

This was reinforced in 2006 with the publication of the UK's general counter-terrorism strategy, CONTEST,[29] which unambiguously stated that criminal prosecution was the UK Government's 'preferred way of disrupting terrorist activity'.[30] This strongly echoed the overarching findings of the Diplock Report, conducted in the early years of the Troubles in an attempt to find ways to deal with terrorism more effectively than resorting to internment, which concluded that criminal prosecution enjoyed primacy.[31] In that respect, as is well known, the UK has often implemented bold, innovative and controversial counter-terrorism

[26] BBC News, 'Britain "At War With Terrorism"' (16 September 2001) at http://news.bbc.co.uk/1/hi/uk_politics/1545411.stm.

[27] The British Government has paid compensation to a number of individuals who have alleged British complicity in extraordinary rendition carried out by the American Central Intelligence Agency. See, for example, R. Mason, 'Britain Pays out £2 Million to Illegal Rendition Libyan', *The Telegraph* (13 December 2012).

[28] See D. Cole, 'The Brits Do It Better' (2008) 55 *The New York Review of Books* 68; D. Cole, 'English Lessons: A Comparative Analysis of UK and US Responses to Terrorism' (2009) 62 CLP 136; K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (CUP, 2011).

[29] Home Office, *Countering International Terrorism* (Cm 6888, 2006), as revised by Cm 7547, 2009; Cm 7833, 2010; Cm 8123, 2011; Cm 8583, 2013; Cm 8848, 2014; Cm 9048, 2015; and Cm. 9310, 2016.

[30] Home Office, *Countering International Terrorism* (Cm 6888, 2006) 17-18. See also most recently HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism: Annual Report for 2015* (Cm 9310, 2016) which stated at para 2.8 that 'Conviction in court is the most effective way to stop terrorists'.

[31] Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland (Diplock Report 1972) (Cmnd 5185, 1972). See also the Inquiry into Legislation Against Terrorism (Lloyd Report 1996) (Cm 3420, 1996). For commentary see C. Walker, 'Prosecuting Terrorism: The Old Bailey Versus Belmarsh' (2009) 79 *Amicus Curiae* 21; C. Walker, 'Terrorism Prosecution in the United Kingdom: Lessons in the Manipulation of Criminalization and Due Process' and J. Jackson, 'Vicious and Virtuous Cycles in Prosecuting Terrorism: The Diplock Court Experience' in F. Ní Aoláin & O. Gross (eds) *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (CUP, 2014).

laws that have influenced other domestic legal systems around the world, not least of all in common law countries such as Canada, New Zealand and Australia.[32]

For example, as the USA chose to indefinitely detain 'unlawful combatants' under the guise of IHL, most notoriously at Guantánamo Bay, the UK provided for its own version of indefinite detention, by means of law enforcement, at Belmarsh Prison in London. With Part 4 of the Anti-Terrorism, Crime and Security Act (ATCS) Act 2001, the UK had found its answer to the vexing problem of having to deal with terrorist suspects who could not be deported due to the principle of *non-refoulement* who, at the same time, could not be prosecuted due to evidentiary concerns. The House of Lords held that this violated Article 5 in conjunction with Article 14 of the ECHR, and issued a declaration of incompatibility under section 4 of the HRA 1998 in respect of the regime.[33]

Accordingly, the British Government responded to the concerns of the Law Lords and implemented the Prevention of Terrorism Act (PTA) 2005 which allowed any individual, crucially including British citizens, to be served with a Control Order. The Control Order mechanism, later replaced by the TPIM regime,[34] was a specifically tailored curfew mechanism that restricted the liberty of designated individuals in several ways and could impose specific conditions upon them. The implementation and evolution of these executive preventative mechanisms, or, as they are termed in this thesis, 'counter-terrorist hybrid orders', provides the focus for this study.

Following the terrorist attacks in London on 7 July 2005 (7/7), the UK again demonstrated its apparent resistance to the war paradigm, despite the Prime Minister's unnerving claim that the 'rules of the game' were changing in regards to the legal obstacles that prevented the

[32] For example, the UK's definition of terrorism under s. 1 of the Terrorism Act 2000 was particularly influential in countries that did not have specific terrorism legislation at the time of 9/11. See K. Roach, 'The Post 9/11 Migration of Britain's Terrorism Act 2000' in S. Choudhry (ed) *The Migration of Constitutional Ideas* (CUP, 2006); K. Roach, 'Sources and Trends in Post-9/11 Anti-Terrorism Laws' in B. J Goold & L. Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007); K. Roach, 'The Migration and Derivation of Counter-Terrorism' in G. Lennon & C. Walker (eds) *Routledge Handbook of Law and Terrorism* (Routledge, 2015).
[33] *A and others v. SSHD* [2004] UKHL 56, [2005] 2 AC 68 ('*A v. SSHD*' or the 'Belmarsh case').
[34] Terrorism Prevention and Investigations Measures Act 2011.

deportation of terrorist suspects and hate preachers.[35] Politicians, academics, lawyers and human rights advocates questioned what 'rules' were going to change, and what impact this was going to have upon the respect for and protection of human rights in the UK. Some, such as Lord Lester, a Liberal Democrat peer, feared that Tony Blair was referring to the rules within IHRL, 'including the UN Convention Against Torture and the Human Rights Act'.[36]

However, seeking to dispense with any doubt as to how the UK viewed the threat from terrorism, the then Director of Public Prosecutions (DPP), Sir Ken MacDonald, unequivocally stated in 2007:

> London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war. And the men who killed them were not… 'soldiers'…They were criminals…On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'. The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.[37]

Speaking in a similar vein soon after, Tony McNulty, a Home Office Minister, stated in 2008 that 'prosecution is – first, second and third – the government's preferred approach when dealing with suspected terrorists'.[38]

These calm and measured responses grounded in the language of the criminal law stand in stark contrast to the reaction espoused by senior American officials in the wake of 9/11. Accordingly, in the aftermath of the 7/7 terrorist attacks, the British Government opted to, at

[35] T. Blair, PM's Press Conference (5 August 2005) at http://webarchive.nationalarchives.gov.uk/20060715135117/number10.gov.uk/page8041.
[36] Lord Lester of Herne Hill, HL Deb 12 October 2005, vol 674, col 366.
[37] K. MacDonald, 'Security and Rights', Speech to the Criminal Bar Association (23 January 2007) at http://www.cps.gov.uk/news/articles/security_rights/.
[38] T. McNulty, Minister for Security, Counter-Terrorism, Crime and Policing, HC Deb 21 February 2008, vol 472, col 561, as referenced in C. Walker, 'Terrorism Prosecution in the United Kingdom' (n. 31) 246.

least in principle, abide by its obligations under IHRL and resort to law enforcement as the primary means by which to confront terrorism.

In addition to the implications of the 2004 Belmarsh judgment, the roots of many of the contemporary concerns with the right to a fair trial in the context of national security pre-date 9/11. In particular, when so-called 'secret trials' are concerned, the origins of much contemporary practice can be traced back to the landmark *Chahal v. UK* judgment in 1996.[39] Although the case is more renowned for the issue of *non-refoulement* and Article 3 of the ECHR, it also considered Article 5(4) regarding an individual's right to access court. The Grand Chamber of the ECtHR held that, due to the shortcomings of the Home Office advisory panel and lack of procedural guarantees that an individual enjoyed, the panel could not be considered a court for the purposes of Article 5(4).[40]

Following the *Chahal* decision in 1996, the UK government passed the Special Immigration Appeals Commission (SIAC) Act 1997 in an attempt to remedy the European Court's critical judgment. The new model of proceedings envisaged under the SIAC Act represented the first manifestation of what are widely termed closed material procedures (CMP). In these proceedings, the individual might not be fully informed of the accusations, evidence or complete judgment, is excluded from closed sessions, and is not permitted any contact with their security-cleared lawyer once that lawyer has been served with the closed evidence.

When the implications and consequences of both the *Chahal* and Belmarsh judgments are considered together, contemporary counter-terrorism practice in the UK provides a compelling focal point for further investigation. The implementation of counter-terrorist hybrid orders, as demonstrated by the now obsolete Control Order regime, and presently by TPIMs and TEOs, can carry harsh restrictions and obligations akin to or, arguably, worse than some forms of criminal punishment. However, the mechanisms are deliberately implemented and reviewed in the civil courts, thus denying the individual the more stringent fair trial

[39] *Chahal v. UK* (App. no. 22414/93) ECtHR [GC], 15 November 1996.
[40] ibid, para 130.

guarantees attached to criminal proceedings whilst, at the same time, criminal sanctions can be imposed for any breach of the attached conditions. Moreover, when the mechanisms are reviewed by the courts, they can be heard under CMP, adding further complexity and epitomising the domination of national security interests that impose troubling restrictions upon fair trial rights usually taken for granted in proceedings concerning serious criminal-related behaviour.

As such, the implementation and administration of counter-terrorist hybrid orders presents unique challenges. When each aspect is considered in isolation, the implications for the right to a fair trial are significant, but, when analysed collectively, the consequences for the right to a fair trial are potentially drastic. This thesis seeks to explore how, when all factors are considered together, the implementation and administration of counter-terrorist hybrid orders has affected the right to a fair trial. Furthermore, given the legal, historical and socio-political background to the study, the thesis seeks to explore how these developments have been allowed to take place. As such, the thesis challenges the assumption made since the onset of the 'War on Terror' that the UK has committed to a framework of law enforcement which upholds high human rights standards. Instead, the thesis argues that, in response to the initial challenges generated by the *Chahal* and Belmarsh judgments, the UK has behaved in a manner that, whilst grounded in law, actually resembles the behaviour of States enduring prolonged emergencies. Ultimately, the thesis argues that the UK's approach to these particular issues denotes a state of 'perpetual quasi-emergency', which has created the space necessary for these consequences to materialise.

1.2 Aims of the Study

Against the background set out above, this thesis aims to provide a critical analysis of some of the most contentious developments in recent counter-terrorism practice in the UK which implicate the right to a fair trial.

In particular, the thesis aims:

i. **To explore the extent to which, if at all, the implementation and administration of counter-terrorist hybrid orders have adversely affected the right to a fair trial in the UK.**

The thesis explores the development, implementation and administration of counter-terrorist hybrid orders, with a view to ascertaining whether, and if so, the extent to which, the use of these mechanisms has adversely affected the right to a fair trial in the UK. The use of such measures undoubtedly carries the *potential* to affect the right to a fair trial in a number of ways. Firstly, the conditions which may be attached to counter-terrorist hybrid orders can be akin to criminal punishment, whilst a breach of those conditions leads to the possibility of criminal sanctions, raising questions over the *substantive fairness* of the mechanisms. Secondly, the manner in which the mechanisms are adjudicated upon, i.e. in civil proceedings which can be heard *in camera* and *ex parte*, raises questions over the *procedural fairness* of the processes for implementing and challenging the mechanisms. As such, the thesis will discuss the history and application of the measures in question, and critically reflect on how those measures have affected the right to a fair trial.

Before analysing the effects of counter-terrorist hybrid orders upon the right to a fair trial, it will first be necessary to outline the scope and limitations of the relevant norms in the context of national security. As such, the thesis provides an assessment of how IHRL responds to threats and emergency situations, and the circumstances in which the restriction or suspension of certain fair trial guarantees may be necessary in order to accommodate

national security concerns. In addition, as will be explained in Chapter 2, under IHRL States are given various degrees of flexibility to respond to threats and acts of terrorism. The thesis therefore also explores how States may derogate from certain aspects of their IHRL obligations pertaining to the right to a fair trial.

ii. Assuming that certain aspects of counter-terrorist hybrid orders have adversely affected the right to a fair trial to some extent, to critically analyse why this has occurred, including analysis of both legal and extra-legal factors.

On the assumption that certain aspects pertaining to the implementation and administration of counter-terrorist hybrid orders have adversely affected the right to a fair trial under IHRL to some extent, the second aim of the thesis is to ascertain how this has been possible. In other words, the thesis examines the various legal and extra-legal factors which have contributed to the introduction and acceptance of measures which are challenging the right to a fair trial. The thesis will analyse why the protection of the right to a fair trial, and the protection of human rights more broadly, has become a lower priority for the UK in the struggle against terrorism. Although traditional explanations have centred on the need to strike a balance between security and liberty, the thesis will argue that analysis must go beyond this narrow legal scrutiny and the metaphorical discourse of balance.

iii. To identify viable avenues through which the UK (and other States facing a terrorist threat) may reconcile their obligations with regard to effective counter-terrorism policies and their human rights obligations pertaining to fair trial standards.

The final aim of the thesis is to provide recommendations, if necessary, as to ways in which the current practice relating to counter-terrorist hybrid orders could be brought in line with the UK's IHRL obligations. These recommendations will be specific to the procedures relating to counter-terrorist hybrid orders which constitute the specific focus of this thesis, but will also

have broader relevance insofar as some of the recommendations have the potential to find application in the context of the UK's wider counter-terrorism approach. Furthermore, given how influential the UK's domestic legal system has been and continues to be in common law States and also more recently in Europe in matters of counter-terrorism, some of these recommendations will be relevant to other States that have implemented, or are considering implementing, similar executive mechanisms or court procedures resembling CMP.

1.3 Research Questions

Set against the background and aims of the study discussed above, the present study will assess whether, and to what extent, the current design of the legal procedures concerning the imposition of counter-terrorist hybrid orders, and their administration in practice, represent an erosion of established fair trial standards. The study will then proceed to examine the legal and extra-legal factors that may have created the space necessary for such a progressive erosion to take place, with a view to making recommendations, if necessary, as to ways in which the practice in this area can be brought in line with the UK's human rights commitments.

In order to answer this question, the following discrete research questions will need to be addressed:

1. What are the international standards pertaining to the right to a fair trial which are particularly relevant in proceedings involving national security concerns?

2. To what extent, and in what circumstances, can fair trial guarantees lawfully be restricted, or partly suspended in accordance with IHRL in response to national security concerns?

3. What is the nature (criminal v. civil / administrative) of the proceedings concerning counter-terrorist hybrid orders, and what are the implications of this characterisation?

4. What aspects pertaining to the design, implementation and administration of counter-terrorist hybrid orders are not in line with internationally recognised fair trial standards, particularly those enshrined in Article 6 ECHR and the jurisprudence of the ECtHR?

5. If counter-terrorist hybrid orders are adversely affecting the right to a fair trial, what are the legal and extra-legal factors that have helped to facilitate the adoption and progressive expansion of these mechanisms?

6. If counter-terrorist hybrid orders are adversely affecting the right to a fair trial, how can the UK reform current practice to ensure that it complies with its obligations under IHRL?

1.4 Literature Review

This section reviews scholarly discussion which has made a significant contribution to knowledge regarding the themes covered in this thesis. A comprehensive literature review of the academic literature addressing the sum of challenges encountered in the post-9/11 legal environment is evidently beyond the scope of this thesis. It is, however, important to acknowledge and engage with some of the most important themes which have remained prevalent and have consistently framed the legal discussion regarding counter-terrorism and the right to a fair trial over the past two decades.

The review is divided into three parts. First, the review addresses academic scholarship which has explored the nexus between terrorism, human rights and emergencies. This part considers how scholars have addressed the post-9/11 legal environment which has, whether directly or indirectly, created space for human rights norms to be threatened. The second part of the review specifically focusses upon the doctrinal debate on the right to a fair trial in

the context of counter-terrorism powers and provides an overview of how legal scholars have discussed the various challenges to the right to a fair trial. This part also explores the academic discussion regarding the legal and extra-legal factors that may have contributed to the weakening of fair trial guarantees in the years since 9/11. The third part of the review considers how scholars have critiqued the specific approaches and methods of the UK in countering terrorism. This part reviews how scholars have analysed the counter-terrorist experience in Northern Ireland, and the more contemporary innovative approaches to combat international terrorism.

1.4.1 Terrorism, Human Rights and Emergencies

Acts of terrorism and counter-terrorist responses are met with such political, media and academic hyperbole that the entire terrorist phenomenon, collectively construed, is constantly framed as one of the most significant challenges to the protection of human rights in the 21st century. Academic commentary discussing the post-9/11 legal environment and the consequent threat to IHRL and the rule of law in general terms has been abundant.[41] Particularly in the aftermath of 9/11, the threat from international terrorism was deemed to be so serious that political leaders often dramatically framed terrorism as an 'existential threat' to democracy.[42] Chiefly in the USA, a specific discourse was quickly adopted and institutionalised after 9/11, ultimately reflected in the 'Global War on Terror' paradigm.[43] Legal opinion on the characterisation of the conflict has been mostly critical of the claim that

[41] See generally D. Luban, 'The War on Terrorism and the End of Human Rights' (2002) 22 *Philosophy and Public Policy Quarterly* 9; J. Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14 EJIL 241; C. Gearty, *Can Human Rights Survive?* (CUP, 2006); C. Gearty, 'Terrorism and Human Rights' (2007) 42 *Government and Opposition* 340; R. Goldstone, 'The Tension between Combating Terrorism and Protecting Civil Liberties' in R. A. Wilson (ed) *Human Rights in the 'War on Terror'* (CUP, 2005); H. Duffy, 'International Human Rights Law and Terrorism: An Overview' in B. Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014). On the threat to the rule of law specifically see B. Dickson, 'Law Versus Terrorism: Can Law Win?' (2005) 1 EHRLR 11; Cole, 'The Brits Do It Better' (n. 28); D. Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (2013) 3 EHRLR 233.

[42] On political rhetoric, see R. Jackson, L. Jarvis, J. Gunning & M. B. Smyth, *Terrorism: A Critical Introduction* (Palgrave Macmillan, 2011) ch 6 'Reconsidering the Terrorism Threat'.

[43] For analysis of this rhetoric, see R. Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press, 2005).

the 'War on Terror' amounted to a genuine armed conflict under international law,[44] although some scholars, predominantly based in the USA, have defended the position.[45] The use of detention and the treatment of detainees since 9/11 has attracted a considerable amount of academic commentary.[46]

Regarding the purported 'existential' threat of terrorism to democracy, legal scholars have typically not acceded to such hyperbolic terminology. Having said that, one comparable legal dimension can be identified with reference to states of emergency in international law and derogations from IHRL obligations.[47] The prevailing legal discussion has generally centred on how regional courts and international monitoring bodies have interpreted and applied the notion of a 'public emergency' insofar as there must exist, *inter alia*, a threat to the life of the nation.

The problems and implications of states of emergency for the respect and protection of IHRL have been identified and discussed at length by many academics.[48] For example, some have noted that many of the most serious human rights abuses occur during public emergencies, 'when states employ extraordinary powers to address threats to public order'.[49] One of the leading and most comprehensive books on these issues, co-authored by

[44] H. Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, 2nd ed, 2015); International Commission of Jurists: Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, 'Assessing Damage, Urging Action' (Geneva, 2009); M. E. O'Connell, 'When is a War Not a War? The Myth of the Global War on Terror' (2005) 12 *ILSA Journal of International and Comparative Law* 535; S. Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) 87 *International Review of the Red Cross* 39; J. Steyn, 'Guantánamo Bay: The Legal Black Hole', 27th F. A. Mann Lecture (25 November 2003).

[45] J. Bellinger, 'Armed Conflict with Al Qaida?' *Opinio Juris* (15 January 2007) at http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/.

[46] R. H. Wagstaff, *Terror Detentions and the Rule of Law: US and UK Perspectives* (OUP, 2014); F. de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP, 2011); M. Elliott, 'United Kingdom: The "War on Terror", U.K.-Style – The Detention and Deportation of Suspected Terrorists' (2010) 8 *Int. J. Constitutional Law* 131; Borelli (n. 44); Steyn (n. 44).

[47] See Chapter 2, section 2.7 for analysis of how IHRL allows States to respond to emergencies.

[48] See J. Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press; OUP, 1992); S. Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 *Oxford Journal of Legal Studies* 69; E. J. Criddle & E. Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 *Human Rights Quarterly* 39; V. V. Ramraj (ed) *Emergencies and the Limits of Legality* (CUP, 2008).

[49] Criddle & Fox-Decent (n. 48) 40; Oraá (n. 48) 1. See more generally International Commission of Jurists, *States of Emergency — Their Impact on Human Rights: A Comparative Study by the*

Oren Gross and Fionnuala Ní Aoláin, discusses the history, theory and application of states of emergency.[50] The authors contend that a number of general models of emergency powers exist: the 'Business as Usual' model, models of accommodation, and the 'Extra-Legal Measures' model. Of these, the most relevant for the purposes of this study are the various models of accommodation which, according to the authors, insist upon 'the maintenance of a legal emergency system so that legal mechanisms and rules control the measures implemented by the authorities in response to a crisis'.[51] This study seeks to build upon this kind of scholarship by exploring certain contemporary counter-terrorist powers which appear to challenge the accustomed models of accommodation under IHRL.

Additionally, scholars have expressed concerns about the dominance of the executive, the passivity of the legislature and the deferential nature of the judiciary when states of emergency are declared, with international monitoring bodies often being left to provide the sole measures of quasi-judicial scrutiny.[52] For example, despite agreeing that executive action ought to be subjected to oversight in terrorism-related emergencies, Fiona de Londras and Fergal Davis have differed in what they consider to be the most effective means of doing so; Davis arguing that the legislature and popular democratic processes must be relied upon, de Londras placing her confidence in the judiciary to intervene.[53] As this study

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International Commission of Jurists (Geneva: International Commission of Jurists, 1983. 477 pp. SF.40).

[50] O. Gross & F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP, 2006).

[51] ibid, 255.

[52] O. Gross & F. Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625; M. Haile, 'The Judicial Management of States of Emergency: Reinforcing or Curtailing the Judiciary's Role?' (2005) 10 *Coventry Law Journal* 19; D. Feldman, 'Human Rights, Terrorism and Risk: The Roles of Politicians and Judges' (2006) PL 364; D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006); A. Conte & R. Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate, 2nd ed, 2009); M. Scheinin & M. Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism' (2011) 8 *Essex Human Rights Review* 20; H. Fenwick & G. Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56 *McGill Law Journal* 863.

[53] F. de Londras & F. F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19.

examines, the deferential nature of the judiciary to the executive in matters of national security can have drastic implications for IHRL.

It is also imperative to acknowledge that the manner in which States respond to acts of terrorism outside of emergency situations carries the potential to restrict, and in some cases violate, human rights. Critical literature regarding the effects of British counter-terrorism legislation on the enjoyment of human rights is broad, abundant and endlessly required with the constant supply of new and innovative counter-terrorism legislation.[54] Equally, scholars and parliamentary committees, not just from the UK, have often raised concerns about the habit of legislatures passing counter-terrorism legislation with great speed, which can undermine democratic accountability and unduly enhance the power of the executive.[55]

1.4.2 The Right to a Fair Trial in the Context of National Security

The apparent conflicts that arise between the protection of human rights and security in matters of counter-terrorism have attracted academic debate prior to and ever since the onset of the 'War on Terror'.[56] The right to a fair trial in emotionally charged terrorism trials has faced particular and unique challenges even prior to 9/11.[57] Many academics have analysed how counter-terrorism responses can fundamentally challenge the basic tenets of

[54] In addition to literature already cited, see M. Elliott, 'The "War on Terror" and the UK's Constitution' (2007) 1 *European Journal of Legal Studies* 1; JCHR, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (2009-10, HL 86, HC 111).

[55] See House of Lords Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* (2008-09, HL 116) paras 64-82; A. Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 IJCL 172, at 186; A. W. Neal, 'Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies' (2012) 6 *International Political Sociology* 260; A. Horne & C. Walker, 'Lessons Learned from Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation Measures by the UK Parliament' (2014) PL 267; G. Carne, 'Sharpening the Learning Curve: Lessons from the Commonwealth Parliamentary Joint Committee of Intelligence and Security Review Experience of Five Important Aspects of Terrorism Laws' (2016) 41 *The University of Western Australia Law Review* 1.

[56] A. Masferrer & C. Walker (eds) *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar Publishing Limited, 2013); C. Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013); Goold & Lazarus (eds), *Security and Human Rights* (n. 32); I. Cameron, *National Security and the European Convention on Human Rights* (Klewer Law International, 2000).

[57] G. Robertson, 'Fair Trials for Terrorists?' in R. A. Wilson (ed) *Human Rights in the War on Terror* (CUP, 2005).

the right to a fair trial recognised and protected under IHRL instruments.[58] In particular, much attention has been devoted to the increasing secrecy of terrorism trials that entail national security concerns.[59]

Several authors have attempted to identify the minimum standards and non-derogable elements of the right that apply in times of emergency by drawing upon other international obligations that States will retain.[60] Others have explored more broadly how States may lawfully respond to emergency situations by utilising 'claw-back' clauses, or derogating from their IHRL obligations.[61] For example, Andrew Ashworth has hypothesised what derogations from Article 6 of the ECHR might be conceivable if a government moved from a 'justice model' to a 'security model' in the criminal process.[62] Ashworth theorised eight changes that could be implemented pursuant to a derogation concerning the right to a fair trial: the

[58] B. Dickson, 'The Right of Access to a Lawyer in Terrorist Cases' in Masferrer & Walker (eds) *Counter-Terrorism, Human Rights and the Rule of Law* (n. 56); S. Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Hart Publishing, 2008) ch 7 'The Right to a Fair Trial'.

[59] For comparative commentary see D. Bigo, S. Carrera, N. Hernanz & A. Scherrer, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', European Parliament, Study for the Committee on Civil Liberties, Justice and Home Affairs (LIBE), (September 2014); A. Gray, 'A Comparison and Critique of Closed Court Hearings' (2014) 18 *International Journal of Evidence and Proof* 230; K. Roach, 'Secret Evidence and Its Alternatives' in A. Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012); G. Lennon & C. Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, 2015), in particular F. Ní Aoláin & O. Gross, 'The Trial of Terrorism: National Security Courts and Beyond' and D. Jenkins, 'The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Change in the Five Eyes Nations'; J. Jackson, 'Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?' (2013) PL 720.

[60] S. Stavros, 'The Right to a Fair Trial in Emergency Situations' (1992) 41 *International and Comparative Law Quarterly* 343; E. Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights' (2009) 1 *Göttingen Journal of International Law* 29.

[61] R. Higgins 'Derogations Under Human Rights Treaties' (1976-1977) 48 *British Yearbook of International Law* 281, reproduced in R. Higgins, *Themes and Theories*, vol 1 (OUP, 2009) ch 5.3 'Derogations Under Human Rights Treaties'; J. Hartman, 'Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1; A. Mokhtar, 'Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights' (2004) 8 *International Journal of Human Rights* 65; R. Burchill, 'When Does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism' (2005) 9 *Yearbook of New Zealand Jurisprudence* 95; J. Lehmann, 'Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' (2011) 8 *Essex Human Rights Review* 105; Gross & Aoláin, 'From Discretion to Scrutiny' (n. 52); Conte, 'Limitations to and Derogations from Covenant Rights' in Conte & Burchill (eds) (n. 52).

[62] A. Ashworth, 'Security, Terrorism and the Value of Human Rights' in Goold & Lazarus (eds) *Security and Human Rights* (n. 32) 217, in reference to Gearty, *Can Human Rights Survive?* (n. 41).

reversal of the burden of proof; the authorisation of self-incrimination; the demand for speedy trials; the constraining of legal aid; the admission of hearsay evidence; the admission of unlawfully obtained evidence; the presumption of dangerousness and granting of long indeterminate sentences; and the political authorisation of prisoner release.[63] Ashworth concludes that five of the Article 6 guarantees 'could only be modified if a derogation were entered under Article 15 (duty to answer questions, very speedy trials, withdrawal of legal aid, presumption of dangerousness, release authorised only by Home Secretary), whereas the other three could be modified more easily because their boundaries appear to be more flexible'.[64]

Looking more closely at the argument that some human rights guarantees have diminished since 9/11, much legal, philosophical and political commentary has been shaped around the apparent trade-off and proper balancing of civil liberties and the interests of national security.[65] At one extreme, Alan Dershowitz famously advocated the use of torture warrants in 2003, indicative of a potential shift away from human rights interests in favour of national security concerns in the 'War on Terror'.[66] In a similar vein, Michael Ignatieff suggested that 'to claim that there are no lesser evil choices to be made is to take refuge in the illusion that the threat of terrorism is exaggerated'.[67]

Some scholars have found this metaphorical language of balancing and trade-offs to be problematic.[68] For example, Daniel Moeckli has suggested that the balancing metaphor is

[63] ibid, 218.
[64] ibid, 223.
[65] See for example M. Ignatieff, 'Paying for Security with Liberty', *Financial Times* (13 September 2001); M. Arden, 'Human Rights in the Age of Terrorism' (2005) 121 LQR 604; R. A. Wilson (ed) *Human Rights in the 'War on Terror'* (CUP, 2005); Goold & Lazarus (eds) *Security and Human Rights* (n. 32), in particular Lazarus & Goold, 'Security and Human Rights: The Search for a Language of Reconciliation' and Ashworth, 'Security, Terrorism and the Value of Human Rights'.
[66] A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, 2003).
[67] M. Ignatieff, *The Lesser Evil: Politics in an Age of Terror* (Princeton University Press, 2004) vii.
[68] See J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191; D. Cole, 'Enemy Aliens' (2002) 54 *Stanford Law Review* 953; L. Zedner, 'Securing Liberty in the Face of Terror' (2005) 32 *Journal of Law and Society* 507; C. Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 *University*

not a helpful device in framing the relationship between liberty and security, arguing that to reduce the relationship to a balancing exercise is a simplistic notion which may obscure the real interests and issues at stake.[69] Ronald Dworkin has contended that the balancing metaphor is 'deeply misleading because it assumes that we should decide which human rights to recognise through a kind of cost-benefit analysis', which, according to him, would be tantamount to declaring that there are no such things as human rights.[70] David Luban has gone as far to argue that 'the whole conversation about "trade-offs" conceals persistent fallacies'.[71]

Some legal scholars have engaged with wider socio-political issues when considering what factors may have contributed to the erosion of high human rights standards after 9/11. For example, Fiona de Londras notes the truism that 'in times of crisis and fear, panic can play an important and corrosive role in our levels of commitment to liberty and human rights, especially the rights of those considered to be "other".'[72] De Londras contends that:

> On its face, the aftermath of 11 September 2001 had all the 'vital ingredients' for panic-related repression: a serious but unquantifiable risk, widespread and deeply felt fear, an impulse towards 'security', an 'othered' enemy, a security-conscious populace and a cadre of moral entrepreneurs ready to make the case that increasing their powers would also increase 'our' security.[73]

Although De Londras' observations concern the issue of detention in the 'War on Terror', they may be relevant to the aims and research questions of this study in light of the objective to take a critical and socio-legal approach to the study of certain counter-terrorism issues. As

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of NSW Law Journal 1; D. Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'* (OUP, 2008) 1-11.

[69] Moeckli (n. 68) 2.

[70] R. Dworkin, 'It is Absurd to Calculate Human Rights According to a Cost-Benefit Analysis', *The Guardian* (24 May 2006).

[71] D. Luban, 'Eight Fallacies About Liberty and Security' in R. A. Wilson (ed) *Human Rights in the 'War on Terror'* (CUP, 2005).

[72] de Londras (n. 46) 4.

[73] ibid.

such, this thesis builds upon this kind of scholarship by exploring how the progressive erosion of fair trial guarantees may have been allowed to occur in recent years.

1.4.3 The United Kingdom's Response to Terrorism

As already mentioned, this literature review is not intended to be exhaustive, and many aspects of this section in particular will be explored and analysed further in Chapters 3 and 4. As alluded to earlier, the UK provides a compelling environment for a study into matters of counter-terrorism and human rights. Particularly in the midst of the Troubles in Northern Ireland, the British Government developed a vast array of counter-terrorist powers which have attracted a wealth of commentary ever since.[74] In particular, scholars have analysed and critiqued measures which have ramifications still today, not least of all the use of the 'Five Techniques',[75] internment,[76] exclusion orders,[77] and the 'Diplock Courts'.[78] However, the more 'distant forerunners' of some aspects of contemporary counter-terrorism practice can be traced even further back,[79] including measures of reporting and exclusion under the Prevention of Violence (Temporary Provisions) Act 1939, and the Civil Authorities (Special Powers) Act (Northern Ireland) 1922.

[74] For general commentary, see C. Walker, *The Prevention of Terrorism in British Law* (Manchester University Press, 2nd ed, 1992); D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate, 2007); A. Jennings (ed), *Justice Under Fire: Abuse of Civil Liberties in Northern Ireland* (Pluto Press, 1990).
[75] F. de Londras, 'Revisiting the Five Techniques in the European Court of Human Rights', *EJIL: Talk* (12 December 2014) at http://www.ejiltalk.org/revisiting-the-five-techniques-in-the-european-court-of-human-rights/; D. Friedman, 'Torture and Modernity' (2013) 5 EHRLR 494.
[76] L. K. Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom, 1922-2000* (Irish Academic Press, 2001); R. J. Spjut, 'Internment and Detention Without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice' (1986) 49 MLR 712.
[77] Walker, *The Prevention of Terrorism in British Law* (n. 74) ch 6 'Exclusion Orders'; C. Scorer, *The Prevention of Terrorism Acts, 1974 and 1976: A Report on the Operation of the Law* (National Council for Civil Liberties, 1976).
[78] See C. Walker, *Terrorism and the Law* (OUP, 2011) 496; Jackson, 'Vicious and Virtuous Cycles in Prosecuting Terrorism' (n. 31); J. Jackson, 'Many Years on in Northern Ireland: The Diplock legacy' (2009) 60 *Northern Ireland Legal Quarterly* 213; C. Carlton, 'Judging without Consensus: The Diplock Courts in Northern Ireland' (1981) 3 *Law and Policy* 225.
[79] C. Walker, *Blackstone's Guide to The Anti-Terrorism Legislation* (OUP, 3rd ed, 2014) 244.

In light of the commitment from successive Governments to prioritise criminal prosecution as the most effective and desirable avenue to disrupt the activities of terrorists,[80] academics have commented extensively on this apparent retreat from executive action and the challenges that this can raise.[81] Nevertheless, from a more theoretical criminal justice and counter-terrorist perspective, some scholars have explored the unsettling shift in recent years from 'post-crime' penal sanctions to the prioritisation of 'pre-crime' preventive action.[82] Scholars have explored the historical origins of the preventive State, although the use of civil preventive orders really came into being in the 1990s.[83] Whilst this shift to preventive action was perhaps manifested most publicly with Anti-Social Behaviour Orders (ASBOs),[84] which may be seen as the 'talisman of civil preventive orders',[85] it is also seen with other executive powers such as sex offender orders,[86] Serious Crime Prevention Orders,[87] and Violent Offender Orders.[88]

[80] See Chapter 1, section 1.1, text accompanying ns. 28-38.
[81] Walker, 'Terrorism Prosecution in the United Kingdom' (n.31); Jackson, 'Vicious and Virtuous Cycles in Prosecuting Terrorism' (n. 31); Walker, 'Prosecuting Terrorism: The Old Bailey Versus Belmarsh' (n. 31).
[82] See A. Ashworth, L. Zedner & P. Tomlin (eds) *Prevention and the Limits of the Criminal Law* (OUP, 2013) in particular ch 5, D. Dyzenhaus, 'Preventive Justice and the Rule-of-Law Project'; A. Ashworth & L. Zedner, *Preventive Justice* (OUP, 2014); IComJ, 'Assessing Damage, Urging Action' (n. 44) in particular ch 5 'Preventive Mechanism'; J. McCulloch & S. Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49 *British Journal of Criminology* 628; L. Zedner, 'Pre-Crime and Post-Criminology' (2007) 11 *Theoretical Criminology* 261; L. Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 CLP 174.
[83] Ashworth & Zedner, *Preventive Justice* (n. 82) ch 2 'The Historical Origins of the Preventive State'.
[84] Crime and Disorder Act 1998, Part I.
[85] Ashworth & Zedner, *Preventive Justice* (n. 82) 78. See also R. Matthews, H. Easton, D. Briggs & K. Pease, *Assessing the Use and Impact of Anti-Social Behaviour Orders* (The Polity Press, 2007); S. Macdonald, 'ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions' (2007) 60 *Parliamentary Affairs* 601; A. Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 LQR 263.
[86] Sexual Offences Act 2003, Part II. In respect of one of these types of orders, Sexual Offences Prevention Orders (SOPOs), similar powers were contained in the Sexual Offenders Act 1997, Part I. See S. Shute, 'The Sexual Offences Act 2003: (4) New Civil Preventative Orders – Sexual Offences Prevention Orders; Foreign Travel Orders; Risk of Sexual Harm Orders' (2004) *Crim. LR* 417.
[87] Serious Crime Act 2007, Part I. See Home Office, *New Powers Against Organised and Financial Crime* (Cm 6875, 2006).
[88] Criminal Justice and Immigration Act 2008, Part VII. See Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Reoffending and Protecting the Public* (Home Office, July 2006).

However, it is also starkly and increasingly demonstrated in contemporary counter-terrorism policy, not least of all with asset-freezing powers in the UK,[89] as well as Control Orders (2005-2011), TPIMs (2011-) and TEOs (2015-) which this thesis focusses upon. Although this thesis is principally concerned with counter-terrorism issues in the UK, other States have adopted powers and policies which appear to replicate or draw inspiration from the UK experience.[90] Moreover, the UN asset-freezing system has filtered down to States and has been a significant issue in Europe.[91]

As already mentioned, the three mechanisms that this thesis focusses on (i.e. Control Orders, TPIMs and TEOs) can impose severe obligations and restrictions upon individuals through the civil courts, and thus without the safeguards provided in a criminal trial, but with criminal sanctions attached nonetheless if the individual breaches the conditions. It is for these reasons, amongst others, that the mechanisms are described as 'counter-terrorist hybrid orders' for the purposes of this thesis.[92] For example, scholars have validly argued that 'hybrid' in this context denotes a measure or law containing elements or characteristics of two previously distinct legal entities;[93] the combination of preventative detention and surveillance;[94] and the blurring of executive and judicial functions.[95]

[89] Terrorist Asset-Freezing etc. Act 2010, which implements UN Security Council Resolution 1373. See the reports of the former Independent Reviewer of Terrorism Legislation, D. Anderson, 'First Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010' (December 2011); 'Second Report' (December 2012); 'Third Report' (December 2013); and 'Fourth Report' (March 2015).

[90] B. Boutin, 'Administrative Measures in Counter-Terrorism and the Protection of Human Rights' (2016) 27 *Security and Human Rights* 128; European Parliamentary Research Service, Briefing: Foreign Fighters – Member State Responses and EU Action (March 2016) 8.

[91] See G. Sullivan & B. Hayes, 'BLACKLISTED: Targeted Sanctions, Preemptive Security and Fundamental Rights', *European Centre for Constitutional and Human Rights*, (December 2010).

[92] Andrew Ashworth and Lucia Zedner have described 'hybrid civil-criminal processes' in the following terms: 'a civil order is made in civil proceedings, restraining the subject's behaviour in specified ways, and breach of the civil order constitutes a criminal offence with a substantial maximum penalty'. A. Ashworth & L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21, at 29.

[93] S. Bronitt & S. Donkin, 'Australian Responses to 9/11: New World Legal Hybrids?' in Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency* (n. 59) 223. See also S. Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, 2014) ch 2 'Preventing Terrorism: An Exceptional Legal Hybrid?'.

[94] Anderson, 'Control Orders in 2011' (n. 6) para 2.13.

[95] Bonner, *Executive Measures, Terrorism and National Security* (n. 74) 23.

Although David Bonner's book, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?*, marks an invaluable contribution to knowledge on the history, usage and implications of executive mechanisms such as Control Orders, the situation has clearly developed since the time of its publication in 2007.[96] Following the more recent introduction of TPIMs and TEOs, and the progressive expansion of CMP into other areas of law, this study seeks to challenge the author's assertion that the only 'rules of the game' that have changed since 9/11 relate to the amount of deference shown by the judiciary to the executive which have, according to Bonner, changed for the benefit of all in democratic society.[97]

Elsewhere, Helen Fenwick and Gavin Phillipson have noted how pre-emptive measures, such as Control Orders, make it likely that human rights will be violated, which places governments in the position of deciding between three options: asserting that human rights are inapplicable; derogating from obligations; or finding a way of diluting the standards upheld by the rights.[98] This thesis will explore this argument in greater detail, and analyse how the UK has attempted to justify some of the counter-terrorist measures it has adopted in recent years which pertain to the right to a fair trial, and whether these measures accord with the constraints of IHRL, if indeed at all.

In this regard, the progressive expansion of CMP in trials involving national security concerns has proven controversial in the sense that some of the most fundamental elements of the right to a fair trial have been significantly challenged.[99] This was first demonstrated in 1997 with the establishment of the Special Immigration Appeals Commission, and since the

[96] ibid.
[97] ibid, ix & 352.
[98] Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52) 866. See also H. Fenwick, 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the "War on Terror"?' (2010) 63 CLP 153.
[99] Several non-governmental organisations have produced high quality reports on the issue. See in particular E. Metcalfe, 'Secret Evidence' (JUSTICE, 2009); Amnesty International, 'Left in the Dark, the Use of Secret Evidence in the United Kingdom' (Amnesty International Publications, 2012).

enactment of the Justice and Security Act 2013, in any civil proceedings, allowing for trials that carry national security concerns to be heard *in camera* and *ex parte*.

These developments give rise to 'parallel systems of questionable justice', in which pre-emptive and often draconian powers are placed within the civil rather than the criminal process and are asserted to be preventive rather punitive.[100] However, some scholars have argued that traditional criminal prosecution has made a comeback in counter-terrorism policy in recent years.[101] For example, Clive Walker argues that there are two principal factors which shift priority towards criminal prosecution rather than executive action. Firstly, there is the 'desire for legitimacy and the symbolic assertion of "normal" constitutional values', and secondly, the 'emergence of home-grown "neighbour terrorism".'[102] This study seeks to reflect upon these observations and conduct a more in-depth analysis of three counter-terrorist mechanisms from the perspective of the right to a fair trial under IHRL.

1.5 Methodology and Thesis Structure

This section provides an account of what methodological factors have guided, shaped and ultimately determined the aims and research questions of this thesis. This section also outlines the overall structure of this thesis.

Methodology can be understood in a number of ways, but ultimately concerns the articulation of what approach has been taken whilst conducting research and why such choices have been made. In other words, methodology concerns the particular ways in which research is carried out and the assumptions and perspectives which underpin an

[100] L. Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Goold & Lazarus (eds) *Security and Human Rights* (n. 32).
[101] C. Walker, 'Terrorism Prosecutions and the Right to a Fair Trial' in B. Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing, 2014).
[102] ibid, 420. See also C. Walker, 'Decennium 7/7: The United Kingdom Terrorist Attacks on July 7, 2005, and the Evolution of Anti-Terrorism Policies, Laws, and Practices' (2015) *Zeitschrift für Internationale Strafrechtsdogmatik* 545, at 551.

investigation.[103] Going further, methodology relates to our understanding of a particular field of enquiry which ultimately guides our thinking when addressing that field.[104]

As this thesis examines the implications and overall compatibility of counter-terrorist hybrid orders with the right to a fair trial, much of its research is rooted in traditional doctrinal literature reviews. Accordingly, this thesis examines the compatibility of the relevant statutory frameworks underpinning the mechanisms, as well as the relevant case law pertaining to the administration of the mechanisms, with the right to a fair trial as it stands primarily under IHRL. However, in light of the aims of the thesis and overarching research question, this is a socio-legal study, as it also examines what legal and extra-legal factors may have influenced this outcome. As such, the research questions and aims of the thesis strongly accord with the purpose of socio-legal research which is to examine law, legal phenomena and the relationships between these issues and wider society.[105]

A socio-legal approach 'embraces disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions'.[106] In other words, socio-legal research is about considering law in the context of broader social and political theories.[107] It has been suggested that the word 'socio' in socio-legal studies denotes 'an interface with a context within which the law exists, be that a sociological,

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[103] C. Morris and C. Murphy, *Getting a PhD in Law* (Hart Publishing, 2011) 28.
[104] R. Cryer, T. Hervey & B. Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart Publishing, 2011) 5.
[105] British Library, Socio-Legal Studies: An Introduction to Collections, at http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html. See generally F. Cownie & A. Bradney, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in D. Watkins & M. Burton (eds) *Research Methods in Law* (Routledge, 2013); R. Banaker & M. Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005).
[106] Society of Legal Scholars Association, *Statement of Principles of Ethical Research Practice* (January 2009) para 1.2.1 at http://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf.
[107] University of Bristol, Law School: Socio-Legal Research, at http://www.bris.ac.uk/law/research/centres-themes/socio-legal-studies.html.

historical, economic, geographical or other context'.[108] In that regard, socio-legal research requires the researcher to draw upon perspectives and methodologies not just fundamental to legal research, but also those relating to the humanities and social sciences. Accordingly, this thesis employs a variety of research methodologies to address the particular research questions and aims outlined above.

Following this introductory chapter, Chapter 2 addresses the first two sub-questions of the thesis outlined above, by setting out the applicable legal framework pertaining to the right to a fair trial in the context of national security. It also attempts to clarify when and how States may lawfully limit or suspend certain fair trial guarantees in proceedings when national security concerns arise. Accordingly, having identified the applicable legal framework, the chapter provides the essential legal context which allows the following chapters to reflect more concisely and critically on the implications of counter-terrorist hybrid orders for the right to a fair trial in the UK.

In almost all legal research projects some doctrinal research is required to build the necessary foundations for subsequent critical analysis.[109] This is particularly pertinent, as doctrinal analysis is concerned with the discovery and development of legal principles and its research questions take the form of asking what the law is in a particular context.[110] As such, Chapter 2 provides a predominantly doctrinal and black letter analysis of the right to a fair trial in the context of national security, in order to plainly set out the relevant fair trial guarantees. To ensure the coherence of the thesis, it is vital to first grasp in a clear and unequivocal manner what the scope and standards of the right to a fair trial are, before

[108] S. Wheeler & P. A. Thomas, 'Socio-Legal Studies' in D. Hayton (ed) *Law's Futures* (Hart Publishing, 2000) 271, as referenced in Cownie & Bradney (n. 105) 35.
[109] See generally T. Hutchinson, 'Doctrinal Research: Researching the Jury' in D. Watkins & M. Burton (eds) *Research Methods in Law* (Routledge, 2013). Hutchinson argues that 'the doctrinal method still necessarily forms the basis for most, if not all, legal research projects' (at 7) and that doctrinal research 'constitutes the foundation or starting point of most legal research projects' (at 28).
[110] P. Chynoweth, 'Legal Research' in A. Knight & L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell Publishing, 2008) 30. See also T. Hutchinson & N. Duncan, 'Defining and Describing what we do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83; R. Posner, 'The Present Situation in Legal Scholarship' (1980) 90 *Yale Law Journal* 1113.

considering in subsequent chapters if, how, and why it has been adversely affected when counter-terrorist hybrid orders are implemented and administered by the courts.

The chapter first addresses the fundamental issue of how the courts determine the nature of proceedings in order to ascertain which specific fair trial guarantees are applicable in any particular proceedings. As the analysis of counter-terrorist hybrid orders in Chapter 3 illustrates, this is a fundamental question as the range of guarantees afforded to individuals involved in proceedings varies depending on whether those proceedings are characterised as criminal or civil. The chapter then addresses the nature of the right to a fair trial itself, and in the process illustrates how the right to a fair trial is inherently limited in certain regards. As such, it explores how the right to a fair trial, as a limited right, provides that numerous fair trial guarantees are susceptible to restrictions without the need for a State to declare a public emergency.

In that regard, the analysis in Chapter 2 is confined to the common law and IHRL, primarily the ECHR, as these collectively shape the applicable legal framework in the UK. As such, Chapter 2 involves the interpretation and analysis of the relevant statutory and international treaty provisions, as well as the appropriate case law found within the common law and the jurisprudence of the ECtHR. Whilst the fair trial guarantees espoused under the ECHR mostly complement common law jurisprudence, and the UK courts have generally adhered to ECtHR jurisprudence, the Chapter will demonstrate how there has been, at times, disparity between the two.[111]

Going further, the chapter systematically analyses the most important fair trial guarantees which are particularly relevant for this thesis, beginning with the maximum set of guarantees that are afforded to individuals in criminal trials. It then analyses which of these guarantees in criminal proceedings are similarly applicable in civil proceedings, or have otherwise been imported by the courts.

[111] See for example G. Anthony, 'Article 6 ECHR, Civil Rights and the Enduring Role of the Common Law' (2013) 19 *European Public Law* 75.

Additionally, the chapter explores how States may decide to declare a public emergency in order to derogate from (i.e. to temporarily suspend) certain aspects of their IHRL obligations. In particular, the chapter examines what procedural and substantive obligations a State must adhere to for a derogation to be lawful. Finally, the chapter considers how the courts and monitoring bodies have scrutinised the declaration of a state of emergency.

Chapter 3 moves away from the approach in Chapter 2 and engages with the more critically oriented third and fourth sub-questions and first aim of the thesis, namely, the characterisation of proceedings concerning counter-terrorist hybrid orders and the compatibility of the mechanisms with the right to a fair trial. In light of the legal framework set out in Chapter 2, the chapter explores the extent to which, if at all, counter-terrorist hybrid orders have adversely affected the right to a fair trial. As such, Chapter 3 begins to shift away from black-letter analysis which is concerned with what the law is, and instead consider the law in its wider context which is inherently less descriptive in nature.[112] This chapter adopts a predominantly doctrinal approach, insofar as it is entails 'the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis'.[113]

This involves a brief analysis of historical developments, as well as more critical analysis of recent policy, statutory provisions and jurisprudence, in light of the applicable legal framework examined in Chapter 2. To aid this analysis, it is important to examine statistical data on the use of counter-terrorist hybrid orders. Statistics concerning the use of Control Orders and TPIMs are easily available and, in the case of TPIMs, regularly revealed by the Home Office and commented upon by the Independent Reviewer of Terrorism Legislation (IRTL). Statistics concerning the use of TEOs were publicly disseminated for the first time in early 2017. For the purposes of this study, a freedom of information request was submitted

[112] Chynoweth (n. 110) 30.
[113] Posner (n. 110) 1113.

to the Home Office seeking clarification over the nature and amount of TEOs that have been implemented against individuals.[114]

The Chapter begins with a brief historical analysis of the origins of counter-terrorist hybrid orders in order to illustrate how and why the mechanisms came into being. Historical analysis is concerned with the recognition of a historical problem or the need for certain historical knowledge, and the analysis of information about the problem which shapes our current understanding of something.[115] The historical analysis in Chapter 3 reveals that current and future trends concerning counter-terrorist hybrid orders will continue to be shaped by past events to some extent, namely, the judgments of the ECtHR in *Chahal v. UK* and the House of Lords in the Belmarsh case.[116] These decisions have resulted in an enduring legal problem to which counter-terrorist hybrid orders represent what may be the long-term solution, at least in the eyes of subsequent British Governments.

Chapter 3 then briefly reverts back to a black-letter analysis in order to outline the statutory frameworks of the various counter-terrorist hybrid orders. This is essential as it demonstrates the clear-cut similarities between the various mechanisms in order to further justify the collective analysis of the regimes throughout the study. Moreover, outlining the comparable features of the mechanisms is imperative when analysing the effects of the mechanisms upon the right to a fair trial in later sections. In that regard, the majority of Chapter 3 critically analyses how counter-terrorist hybrid orders have affected the fair trial guarantees analysed in Chapter 2. In order to further illustrate the similarities of all counter-terrorist hybrid orders, the chapter analyses the common issues affecting all three mechanisms, rather than systematically exploring each mechanism in turn.

[114] The request was rejected under s. 22 of the Freedom of Information Act 2000 as the material was intended for future publication. See Chapter 3, section 3.3.3, text accompanying ns. 624-627.
[115] C. Busha & S. Harter, *Research Methods in Librarianship: Techniques and Interpretations* (Academic Press, 1980) 91.
[116] *Chahal v. UK* (n. 39); *A v. SSHD* (n. 33).

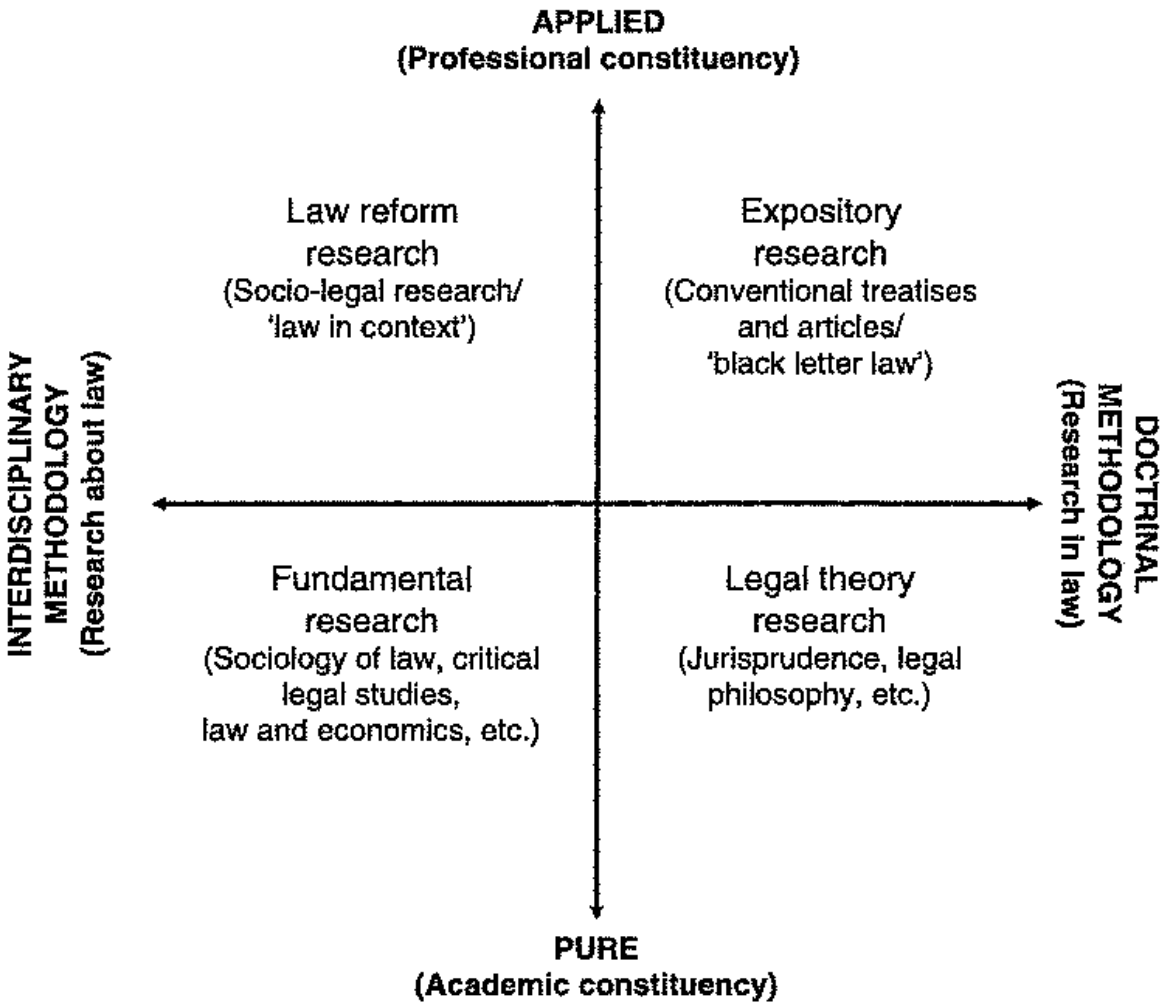
As such, the chapter analyses how the issue of the nature of proceedings concerning counter-terrorist hybrid orders has been approached by the various stakeholders but most importantly, how the courts have responded. The chapter then addresses the nature of the mechanisms in more detail, but in particular, how the use of CMP has radically altered the trial process in matters of national security, and how the unique nature of TEOs raises additional challenges. The chapter then evaluates what steps have been taken in the attempt to mitigate the perceived unfairness of the mechanisms insofar as the right to a fair trial is concerned.

Chapter 4 engages with the fifth sub-question and second aim of the thesis in order to critically analyse what legal and extra-legal factors may have contributed to the establishment of what is termed the state of 'perpetual quasi-emergency'. It is this chapter in particular which has proven most challenging from a methodological perspective, raising stimulating and thought-provoking questions over the viability of the overarching research question, aims of the thesis, and how these would be addressed.

Chapter 4 fully establishes the thesis as a socio-legal study. It departs from the doctrinal analysis undertaken in Chapter 2 and Chapter 3, and takes a more external view of the law in order to understand and explain the identified effects upon the right to a fair trial. In essence, Chapter 4 follows on from statements of law and doctrinal analysis embodied in Chapter 2 and Chapter 3, with socio-legal analysis to tackle the overarching research question.[117] In that regard, Chapter 4 marks a leftwards shift on Paul Chynoweth's matrix of legal research, shifting from strict doctrinal methodology to interdisciplinary methodology.[118]

[117] Hutchinson (n. 109) 23.

[118] Chynoweth's matrix depicts Harry Arthurs' taxonomy of legal research styles. See H. W. Arthurs, 'Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law', *Information Division, Social Sciences and Humanities Research Council of Canada* (1983) 63-71, as referenced in Chynoweth (n. 110) 28-30.



In other words, the study shifts from one of internal enquiry i.e. what the law is, to one of external enquiry, i.e. what the law is about.[119] In essence, whereas Chapters 2 and 3 are concerned with what the right to a fair trial entails in the context of national security and the effects of counter-terrorist hybrid orders upon that right, Chapter 4 is concerned with the actual position and implications of the mechanisms within society.

Accordingly, with the more critically oriented research questions and aims of this thesis in mind, Chapter 4 adopts more radical methodologies rooted in critical theory.[120] Whilst no clear single definition of critical theory can be identified, Michel Foucault argued in 1981 that:

[119] Chynoweth (n. 110) 30.
[120] All critical approaches find their origins in the writings of philosophers and social scientists such as Karl Marx, Sigmund Freud, the 'Frankfurt School' (philosophers such as Max Horkheimer, Herbert

> [A] critique is not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest…Criticism is a matter of flushing out that thought and trying to change it: to show that things are not as self-evident as one believed, to see what is accepted as self-evident will no longer be accepted as such.[121]

In the following decades and in various academic disciplines, different interpretations of critical theory built upon these ideas, some of which are particularly pertinent to studies which address matters of terrorism, counter-terrorism and human rights. In particular, Critical Legal Studies (CLS) and Critical Terrorism Studies (CTS) share comparable ontological, epistemological and methodological commitments, making them potentially useful to socio-legal studies. The theories share similar commitments in the sense that they are each challenges to, and rejections of, the dominant, traditional and orthodox approaches to their respective academic fields. According to some of the leading proponents of CTS, all critical approaches are rooted in a number of shared concerns and commitments despite the various disciplinary backgrounds and approaches to the study of terrorism.[122] These entail 'scepticism towards accepted knowledge claims and dominant ideas', the prioritisation of primary data, 'sensitivity towards issues of knowledge and power', and an 'ethical commitment to human rights, progressive politics and improving the lives of individuals and communities'.[123] Whilst investigating the factors that may have contributed in some way to allowing the erosion of certain fair trial guarantees, it is clear that each of these theories have a role to play.

Marcuse, Theodor Adorno, Walter Benjamin, Erich Fromm and Jürgen Habermas), Antonio Gramsci, Michel Foucault and Jacques Derrida.

[121] M. Foucalt, *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984* (Edited by L. D. Kritzman, translated by A. Sheridan, Routledge, 1988) 154-155. See also R. Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (CUP, 1981) 1-2.

[122] Jackson et al, *Terrorism: A Critical Introduction* (n. 42) 30.

[123] ibid, 30-31.

In essence, advocates of CLS react against features of the prevailing orthodoxies and conservatism in legal scholarship and law schools,[124] and against the purpose of law and legal institutions in society.[125] In other words, the overarching characteristic of CLS is that it is both possible and necessary to think differently about the law.[126] Specifically, CLS scholars reject the dominant tradition of Anglo-American legal scholarship, i.e. doctrinal black letter law, and seek to challenge existing institutions and ideas. Furthermore, it is argued that law is merely a collection of beliefs and prejudices that legitimise the injustices of society. The inherent scepticism of CLS is well-noted by Allan Hutchinson and Patrick Monahan:

> Law is not so much a rational enterprise as a vast exercise in rationalization. Legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes…Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorising, describing, organizing and comparing: it is *not* a methodology for reaching substantive outcomes.[127]

One particularly important assumption of CLS is that law cannot be separated from politics and that law exists to support the interests of the wealthy, powerful, or class that forms it. As Michael Freeman argued, 'Law is politics. It does not have an existence outside of

[124] The Critical Legal Studies (CLS) movement originated in the USA in 1977 at a conference at the University of Wisconsin-Madison, and gradually spread to Western Europe in the early 1980s. The movement finds its roots in the radical political culture of the 1960s in the USA, with the civil rights movement and protests against the Vietnam War. See generally R. Ungar, 'The Critical Legal Studies Movement' (1982) 96 *Harvard Law Review* 561; A. Hutchinson & P. J. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199 (Critical Legal Studies Symposium); M. G. Kelman, 'Trashing' (1984) 36 *Stanford Law Review* 293 (Critical Legal Studies Symposium); A. Hunt, 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1; M. Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987); P. Fitzpatrick & A. Hunt (eds), *Critical Legal Studies* (Basil Blackwell Ltd, 1987) in particular, A. Hunt 'The Critique of Law: What is "Critical" about Critical legal Theory?' and P. Hirst & P. Jones 'The Critical Resources of Established Jurisprudence'; A. Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990); J. Boyle, *Critical Legal Studies* (Dartmouth, 1992); P. Minkkinen, 'Critical Legal "Method" as Attitude' in D. Watkins & M. Burton (eds), *Research Methods in Law* (Routledge, 2013).

[125] Hunt, 'The Critique of Law' (n. 124) 5.

[126] ibid, 6.

[127] Hutchinson & Monahan (n. 124) 206. (Emphasis supplied).

ideological battles within society'.[128] In that regard, there are few legal issues which attract as much debate and disagreement as the inherently political nature of the definition of terrorism. The well-known cliché that 'one man's terrorist is another man's freedom fighter' is perhaps the best-known phrase epitomising this issue, whilst the apparent justifications for counter-terrorist legislation that infringes civil liberties can be equally contentious. In that regard, Jacques Derrida, perceived as the father of the deconstruction movement, remarked after 9/11 that 'the dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation'.[129]

Another vital function which CLS scholars maintain is essential to critical theory is that it is plainly insufficient to merely provide criticism of the law. Rather, critical theory must pursue an 'alternative', because without such, 'critique disintegrates and turns into criticism'.[130] Although CLS has undoubtedly retreated from its peak, the movement nevertheless inspired other subgroups of critical theory, not least of all postmodernism, the feminist movement and critical race theory.

When pursuing inter-disciplinary research into counter-terrorism issues, it is also useful to consider CTS which provides many valuable insights and reinforces the socio-legal nature of this study.[131] As a methodological approach unfamiliar to legal scholars, CTS proponents reject the orthodox and state-centric tradition of terrorism scholarship, and instead argue that knowledge of terrorism can never be isolated from power and context, and that terrorism is a

[128] M. Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014) 1018.
[129] G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press, 2004) 105.
[130] Hirst & Jones (n. 124) 22. In this regard, Stephen Guest has criticised CLS scholars and argued that they 'should be more workmanlike and above all creative. It is nihilistic in lacking a vision'. See S. Guest, 'Why the "Critical Theorists" Miss the Point or the Human Face of Law' (1993) 46 CLP 221, at 233.
[131] The origins of the CTS movement can be traced back to the late 1970s, with critical thinkers such as Noam Chomsky challenging the foreign policy of the USA in particular. See N. Chomsky & E. Herman, *The Political Economy of Human Rights*: *The Washington Connection and Third World Fascism* (South End Press, 1979). However, the more immediate catalyst for the growth of CTS can be found in post-9/11 academic culture in the UK, as there was a growing dissatisfaction with how the 'War on Terror' was being discussed and critiqued.

social construct rather than objective fact.[132] According to Richard Jackson, CTS can be understood 'as a critical orientation, a sceptical attitude, and a willingness to challenge received wisdom and knowledge about terrorism'.[133]

The central ontological commitment of CTS is that terrorism and the terrorist label are social facts rather than 'brute' facts.[134] In order words, terrorism is a social construct and the decision to attribute the label of 'terrorism' to an act of violence is done so not purely based on the factual violence itself, but on the observer's analysis and judgment. Furthermore, the ontology of CTS maintains that terrorism amounts to a strategy to achieve a particular outcome, which again emphasises the core ontological assumption that terrorism cannot be viewed objectively. In terms of its epistemology, CTS scholars maintain that our knowledge of terrorism can never be isolated from power and context, and that the creation of knowledge about terrorism is a social process which depends on a great many contextual factors.[135] Furthermore, one epistemological commitment of CTS is to openly consider the possibility of State terrorism. CTS is also epistemologically committed to acknowledging a researcher's own limitations and bias, vis-à-vis identity, values and perceptions.

For socio-legal studies, one attraction of CTS is its openness to disciplinary pluralism. From a methodological perspective, 'CTS scholars are committed to methodological and disciplinary pluralism in terrorism research – a willingness to embrace insights and perspectives of different academic disciplines, intellectual approaches and schools of thought'.[136]

In light of the political, religious and ethnic dimensions of the present study and contemporary counter-terrorism in general, it may also be apt to consider Critical Race

[132] See generally J. Gunning, 'A Case for Critical Terrorism Studies?' (2007) 42 *Government and Opposition* 363; R. Jackson, M. B. Smyth & J. Gunning (eds) *Critical Terrorism Studies: A New Research Agenda* (Routledge, 2009); Jackson et al, *Terrorism: A Critical Introduction* (n. 42).
[133] R. Jackson, 'Critical Terrorism Studies: An Explanation, a Defence and a Way Forward', Paper prepared for the BISA Annual Conference, University of Leicester (14-16 December 2009) 3.
[134] Jackson et al, *Terrorism: A Critical Introduction* (n. 42) 35.
[135] ibid, 36.
[136] ibid, 38-39.

Theory (CRT).[137] According to Richard Delgado and Jean Stefancic, a number of underlying assumptions of CRT can be identified, but chiefly that 'racism is ordinary, not aberrational…the usual way society does business'.[138] Critical race theorists in the USA assert that 'both the procedures and the substance of American law, including antidiscrimination law, are structured to maintain white privilege'.[139] For example, it has been argued that seemingly progressive and liberalising court judgments are often deceptive and merely create the impression that inequality is being addressed, when in reality the main beneficiaries are the dominant white class.[140] However, given the fundamental similarities with CLS, which is a broader and much more adaptable critical methodological approach in comparison to the narrower and more radical nature of CRT, it was decided at an early stage not to incorporate CRT in this thesis.

With the similarities of CLS and CTS in mind, Chapter 4 analyses the notion of the state of 'perpetual quasi-emergency'. In light of the findings in Chapters 2 and 3, the chapter asserts that the experience of counter-terrorist hybrid orders demonstrates that, whilst grounded in a legal framework, the UK is acting in a manner similar to States enduring a 'prolonged emergency'. Moreover, the UK has deteriorated into a state of 'perpetual quasi-emergency' which has created the space necessary for the adverse effects upon the fair trial guarantees identified in Chapter 2 to materialise. By this, it is meant that, in response to a distinct legal problem, the UK has not formally declared an emergency but is acting at the margins of permissible conduct under IHRL which undermines certain fair trial guarantees. As such, Chapter 4 explores what this entails, asserting that such behaviour is only made possible

[137] CRT emerged in the USA in the mid-1970s, in response to the stalling progress of the civil rights movement. See, for example, D. Bell, *Race, Racism, and American Law* (Little, Brown and Co, 1973); M. Matsuda, C. Lawrence III, R. Delgado & K. Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993); R. Delgado & J. Stefancic, 'Critical Race Theory: An Annotated Bibliography' (1993) 79 *Virginia Law Review* 461; K. Crenshaw, N. Gotanda, G. Peller & K. Thomas, *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press, 1995).

[138] R. Delgado & J. Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 2nd ed, 2012) 7.

[139] F. Valdes, J. Culp & A. Harris, *Crossroads, Directions, and a New Critical Race Theory* (Temple University Press, 2002) 1.

[140] See, for example, D. Bell, '*Brown v. Board of Education* and the Interest-Convergence Dilemma' (1980) 93 *Harvard Law Review* 518.

through the culmination of several legal and extra-legal factors which help to establish and preserve the state of perpetual quasi-emergency.

Crucially, however, the chapter asserts that the state of perpetual quasi-emergency could not be maintained by legal factors alone, as certain factors have pushed back against the Government to reduce the harsh conditions attached to the mechanisms and, more importantly for the purposes of this thesis, to gradually improve the fairness of proceedings. Rather, a number of factors have helped to reinforce the state of perpetual quasi-emergency. These extra-legal factors relate to the metaphor of balance between liberty and security, and the overwhelming rhetoric of panic, threat and fear which dominates political discourse and, as will be shown to a certain extent, has a role to play in the legislative process. The critical theories discussed above are pivotal to understanding these extra-legal factors, as traditional doctrinal analysis would be inadequate to deal with these issues.

Specifically with this final extra-legal factor in mind, Chapter 4 considers the results of some content analysis that was conducted during the latter research stages of this study. In its most general sense, 'content analysis is any technique for making inferences by objectively and systematically identifying specified characteristics of messages'.[141] In recent years, some scholars have conducted content analysis of issues and concepts that are particularly relatable to the matters addressed in this thesis. For example, Donald Holbrook et al have devised a grading criterion for use when determining whether, and the extent to which, discursive content can be considered 'terroristic'.[142] In a different context Eva Herschinger has analysed the debates that have taken place before the United Nations (UN) concerning

[141] O. R. Holsti, *Content Analysis for the Social Sciences and Humanities* (Addison-Wesley, 1969) 14 as referenced in A. Bryman, *Social Research Methods* (OUP, 3rd ed, 2008) 274. See also B. Berelson, *Content Analysis in Communication Research* (Free Press, 1952).
[142] D. Holbrook, G. Ramsay & M. Taylor, '"Terroristic Content": Towards a Grading Scale' (2013) 25 *Terrorism and Political Violence* 202.

the definition of international terrorism, finding, for example, that 'terrorism' is frequently framed as an 'existential crisis'.[143]

However, one of the most significant examples of scholarly content analysis which relates to the aims and themes of this thesis can be found in Ipek Demirsu's recent monograph, *Counter-Terrorism and the Prospects of Human Rights*,[144] in which the author scrutinises the enactment of recent counter-terrorist legislation in Turkey and the UK. In the UK, Demirsu analyses the parliamentary debates pertaining to the enactment of the ATCS Act 2001, the Terrorism Act 2006 and the TPIM Act 2011. Despite the significant historical, legal and political differences between Turkey and the UK, Demirsu concludes that similar rhetoric featured in the parliamentary debates leading to the enactment of counter-terrorism laws in both countries.[145]

Drawing inspiration from these contributions, the content analysis in this particular study examines two parliamentary stages behind the enactment of four key Acts of Parliament, three of which underpin the counter-terrorist hybrid order regimes analysed in Chapter 3. These are the Prevention of Terrorism Act (PTA) 2005, the Terrorism Prevention and Investigation Measures (TPIM) Act 2011, the Counter-Terrorism and Security (CTS) Act 2015 and the Justice and Security Act (JSA) 2013. The research was conducted via the specialist software, Nvivo, in the attempt to assess what role, if any, the rhetoric of panic, threat and fear may have played in the legislative processes leading to the adoption of the four relevant statutes.

[143] E. Herschinger, 'A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism' (2013) 25 *Terrorism and Political Violence* 183, at 190.
[144] I. Demirsu, *Counter-Terrorism and the Prospects of Human Rights: Securitizing Difference and Dissent* (Palgrave MacMillan, 2017). I am grateful to the publisher for providing me with an advanced inspection copy in June 2017 for the purposes of writing a book review.
[145] ibid, ch 11. See also B. Stanford 'Counter-Terrorism and the Prospects of Human Rights: Securitizing Difference and Dissent' (2017) 22 *European Human Rights Law Review* 525 (Book review).

Since the objective of this particular analysis was to examine the 'official representation of issues pertaining to national security and human rights',[146] the research was focussed on the parliamentary debates and committee stages of the four Bills. In addition to the methodological justification for this analysis, which will be discussed further below and also in Chapter 4, these sources have one particular advantage. These debates can be easily read via Hansard which is publicly accessible over the internet, which provides a permanent and unedited archive of parliamentary proceedings.[147] This helps to ensure democratic accountability,[148] and from a methodological perspective, other researchers are able to conduct identical or similar research to verify the findings and analysis conducted by a researcher. Moreover, as parliamentary debates are permanently archived and are clearly pivotal to the law-making process, the analysis of these debates would accord strongly with the purpose of CTS, which as explained earlier, prioritises primary data and shows a 'sensitivity' towards issues of power, amongst other things.[149]

In order to ensure consistency and narrow down the scope of the research for practical purposes, the content analysis was confined to the second readings and committee stages of each Bill in both Houses of Parliament. Whilst the other stages of the legislative process as well as pre-legislative and post-legislative scrutiny are undoubtedly valuable for ensuring good quality legislation,[150] for example with the consideration of draft Bills, white papers, public consultation and committee reports, the second readings and committee stages are arguably more significant especially when counter-terrorism powers are at stake.

[146] Demirsu (n. 144) 52.
[147] As Neophytos Loizides argues, 'parliamentary debates do not allow framers to reconstruct their positions. Parliamentary speeches are unrefined and unedited by third parties—unlike an editor's selection of news…' See N. G. Loizides 'Elite Framing and Conflict Transformation in Turkey' (2009) 62 *Parliamentary Affairs* 278, at 282.
[148] Demirsu (n. 144) 52.
[149] See above n. 123.
[150] On which, see House of Commons Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (2013-14, HC 85); House of Commons Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation: Government Response to the Committee's First Report of Session 2013-14* (2013-14, HC 611).

In that regard, the second readings and committee stage are arguably the most crucial stages of the legislative process leading to the creation of counter-terrorist hybrid orders for a number of reasons. First of all, as counter-terrorism legislation is often fast-tracked or semi fast-tracked through Parliament, therefore limiting or entirely circumventing some of the earlier preparatory and pre-legislative stages altogether,[151] it may be difficult to conduct meaningful and consistent content analysis of these earlier stages. Even if an examination of these stages would generate some useful research, the second readings and committee stages of Bills are arguably more significant and deserving of further analysis for other reasons.

As parliamentarians often, but not always, vote on a proposed Bill immediately after debating its content in the second and third readings, either allowing a Bill to progress or to defeat it, readings hold an obvious political and constitutional significance. However, the second reading stands out from the first and third readings for a number of reasons. From a practical perspective, the second reading is the first opportunity for parliamentarians to debate the key principles of the Bill, as the first reading is usually a formality with no debate actually taking place.[152] In addition, the third reading stage of a Bill is of limited significance, as the contents of a Bill are usually already settled and only the House of Lords can make minor amendments at this stage.[153] In that respect, statistics show that the House of Lords spends more time on second readings than any other reading.[154] Secondly, owing to the clear political significance of the second readings, this may in fact be the only stage of the legislative process that much of the public observe owing to the media attention that the

[151] See House of Lords Select Committee on the Constitution, *Fast-Track Legislation* (n. 55) paras 64-82. See also Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts' (n. 55) 186; Horne & Walker, 'Lessons Learned from Political Constitutionalism?' (n. 55) 271.
[152] UK Parliament, About Parliament: How Parliament Works: Making Laws: Passage of a Bill at http://www.parliament.uk/about/how/laws/passage-bill/.
[153] ibid.
[154] The House of Lords spends more time on the second readings of Bills than the first and third readings combined. For example, in the 2014-2015 parliamentary session, during which the Counter-Terrorism and Security Act 2015 was passed, the House of Lords spent 11.5% of its time on second readings, compared to <0.1% and 2% on first and third readings respectively. See House of Lords, Statistics on Business and Membership (Session 2014-15: 4 June 2014 to 26 March 2015) 5-6.

readings attract. As such, the second reading stage represents a particularly opportune moment for the rhetoric of panic, threat and fear to feature.

Although the committee stage of a Bill perhaps lacks the direct political significance and media attention that readings can attract, they are usually longer and more decisive than readings when drafting the final clauses of a proposed Bill.[155] It is at this stage where a detailed examination of a Bill occurs and, if the Bill originates in the House of Commons, experts and interest groups can present evidence to the House.[156] Moreover, if the Bill is fast-tracked, the committee stage may represent the best opportunity for meaningful scrutiny and for amendments to be made. Therefore, the committee stage retains a clear political significance that other stages may lack.

Lastly, when analysing the debates, particular attention was shown to the contributions of certain parliamentarians, in particular Government Ministers. These parliamentarians are also members of the executive and are, therefore, symbols of the law-making ability of the sovereign.[157] The executive also control timetabling issues,[158] allowing them to shape the speed and tone of the debate. However, at the same time, the contributions of Opposition shadow ministers are also particularly valuable, as these can demonstrate consensus between parties.[159] As one scholar has observed, albeit in a different jurisdiction, bi-partisanship can play a part in eroding legislative scrutiny.[160]

Having established the parameters of the research, the content analysis focussed upon the results of certain word frequency and text searches conducted via the Nvivo Query function.

[155] ibid. During the 2014-2015 parliamentary session, the House of Lords spent 26.4% of its time in the committee stage, compared to 11.5% of its time on second readings, and <0.1% and 2% on first and third readings respectively.
[156] UK Parliament, About Parliament: How Parliament Works: Making Laws: Passage of a Bill at http://www.parliament.uk/about/how/laws/passage-bill/.
[157] Neal (n. 55) 263.
[158] ibid.
[159] Donohue (n. 76) 296.
[160] Carne (n. 55) 5.

The particular search parameters and reasons for these are noted in Chapter 4,[161] whilst a short explanation and evidence of the research is provided in Appendix II.

Finally, Chapter 5 evaluates the overall thesis and concludes. Bearing in mind the third aim and sixth sub-question of the thesis, the chapter makes a number of recommendations in light of the analysis and findings of the study that may be of relevance not just for the UK, but also for other States. The chapter then considers what short-term and long-term developments may be of relevance to the thesis, or might otherwise necessitate further research, before offering some final remarks.

[161] See Chapter 4, section 4.4.3.

Chapter 2. The Right to a Fair Trial in Proceedings with National Security Concerns: Guarantees, Limitations and Derogations

2.1 Introduction

This chapter outlines and critically analyses the fundamental elements of the right to a fair trial with a particular focus on those guarantees that are most relevant for the purposes of counter-terrorist hybrid orders.[162] The chapter also examines a further means by which certain fair trial guarantees can be limited in the context of national security, namely, the possibility for States to derogate from some aspects of their IHRL obligations in response to a state of emergency.

Following this introduction, the chapter addresses a number of important preliminary issues. First, it briefly outlines the guarantees pertaining to the right to a fair trial under IHRL and analyses how the courts determine the nature of a trial in order to ascertain which fair trial guarantees are applicable in any particular proceedings. The chapter then addresses the nature of the right to a fair trial itself, and in the process, explores how the inherent limitations of the right to a fair trial play out in proceedings entailing national security concerns. The chapter then systematically analyses the most important fair trial guarantees that are particularly relevant for this thesis, beginning with the maximum set of guarantees afforded to individuals in criminal trials. Following this, the chapter analyses which of these guarantees are similarly applicable in civil proceedings, or have otherwise been imported by the courts. Finally, the chapter explores how certain guarantees of the right to a fair trial can be derogated from in times of emergency, before some brief conclusions are made.

[162] An examination of certain fair trial guarantees such as the right to an independent and impartial tribunal and some specific guarantees in criminal proceedings are beyond the scope of this thesis for the simple reason that counter-terrorist hybrid orders do not raise issues concerning every fair trial guarantee.

Therefore, the chapter does not provide a comprehensive overview of the right to a fair trial,[163] rather, it analyses the extent and the manner in which these fair trial guarantees under IHRL are applicable in proceedings entailing national security concerns. As such, having identified and analysed the applicable legal framework, the chapter provides the necessary legal context which allows the following chapters to reflect more meticulously on how the right to a fair trial has been affected, and to what extent.

Where appropriate, and bearing in mind the UK's influence over the evolution of the right to a fair trial, the chapter draws upon the most important common law developments which have helped to shape the contours of the right, as it is currently understood at the international level. It also analyses how the key IHRL instruments have codified the right to a fair trial and provided for a set of minimum guarantees. Attention is focussed upon the two most comprehensive IHRL treaties containing specific fair trial guarantees that bind the UK: primarily the ECHR,[164] but also the ICCPR.[165] Where relevant, the increasingly important protections enshrined in the Charter of Fundamental Rights of the European Union (EU)[166] and two EU Directives pertaining to the right to a fair trial are also considered,[167] although

[163] For commentary on the right to a fair trial generally, see R. Clayton & H. Tomlinson, *Fair Trial Rights* (OUP, 2nd ed, 2010); P. Leanza & O. Pridal, *The Right to a Fair Trial* (Kluwer, 2014); R. Goss, *Criminal Fair Trial Rights* (Hart, 2014); D. Hovell, *The Power of Process* (OUP, 2016). Several international and non-governmental organisations have produced comprehensive handbooks pertaining to the right to a fair trial under IHRL. See Interights, 'Right to a Fair Trial Under the European Convention on Human Rights (Article 6)' (Interights Manual for Lawyers, 2009); D. Vitkauskas and G. Dikov, 'Protecting the Right to a Fair Trial Under the European Convention on Human Rights' (Council of Europe Human Rights Handbooks, Directorate General of Human Rights and Rule of Law, 2012); Amnesty International, 'Fair Trial Handbook' (Amnesty International Publications, 2nd ed, 2014).

[164] For commentary on the ECHR, see C. Grabenwarter, *European Convention for the Protection of Human Rights and Fundamental Freedoms: Commentary* (Beck & Hart Publishing, 2014); Schabas (n. 15).

[165] For commentary on the ICCPR, see D. Harris & S. Joseph (eds) *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, 1996); Bossuyt (n. 19).

[166] Charter of Fundamental Rights of the European Union (2000/C 364/01, 18 December 2000). Article 51(1) provides that the Charter is applicable only in the implementation of EU Law. For commentary on the Charter see W. B. T. Mock & G. Demuro (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press, 2010); S. Peers, T. Hervey, J. Kenner & A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (Beck, Hart & Nomos Publishing, 2014).

[167] The EU has issued a number of Directives pursuant to the objective of maintaining and developing an area of freedom, security and justice and the principle of mutual recognition of judgments across Member States. The Directives were prompted by the Council Resolution of 30 November 2009 on a Roadmap for Strengthening the Procedural Rights of Suspected or Accused Persons in Criminal

the significance of these protections in the UK may soon diminish given the result of the 2016 Referendum on the UK's membership of the EU.

2.2 The Determination of the Civil or Criminal Nature of Proceedings

The domestic courts in England and Wales have generally held that the classification of proceedings is less important than the question of what protections are required for a fair hearing. For example, in *International Transport Roth GmbH v. SSHD*, Simon LJ questioned if, rather than determining if proceedings were civil or criminal, it was not simpler 'to address the question as to whether the protections are indeed necessary to achieve a fair trial of whatever may be the issue'.[168] In the same case, Parker LJ held that Article 6 of the ECHR should be given a 'flexible interpretation', and that there should be a 'sliding scale' ranging between trivial civil wrongs and the most serious crimes, following which, 'the more serious the allegation or charge, the more astute should the courts be to ensure that the trial process is a fair one'.[169] In other words, the domestic courts have insisted that the demands of fairness vary in each case and that the gravity and complexity of a case impact on what fairness requires.[170]

However, under IHRL, distinguishing between civil and criminal proceedings is a much more important task. The range of fair trial guarantees afforded to individuals involved in judicial proceedings varies depending on whether those proceedings are 'criminal' or 'civil' in nature, i.e. whether they are concerned with the determination of a 'criminal charge', or whether the proceedings concern the determination of an individual's 'civil rights and obligations'.[171] The

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Proceedings (2009/C 295/01). However, the UK has only opted into the European Parliament and Council Directive 2010/64/EU of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings [2010] OJ L280/1; and the European Parliament and Council Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings [2012] OJ L142/1.

[168] *International Transport Roth GmbH v. SSHD* [2002] EWCA Civ 158, [2003] QB 728, para 33.

[169] ibid, para 148.

[170] *R v. Securities and Futures Authority Ltd, ex parte Fluerose* [2001] EWCA Civ 2015, para 14.

[171] Art. 6(1) ECHR; Art. 14(1) ICCPR.

distinction is significant, because stronger and more detailed guarantees apply in criminal proceedings. As such, the right to a fair trial under IHRL encapsulates 'various guarantees with different scopes of application'.[172] This is particularly relevant for the purposes of this study, as counter-terrorist hybrid orders appear to blur the distinction between the civil and the criminal law.

In essence, States are given greater flexibility in disputes involving civil rights than they are with criminal matters in the application of the right to a fair trial. For example, the ECtHR has held that 'the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge'.[173] In this regard, the Court pointed out that due to the distinction of guarantees applicable in civil and criminal trials, 'the contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases'.[174]

In setting out the guarantees which apply to each type of proceedings, the relevant provisions of the ECHR and the ICCPR are framed in a very similar fashion, first providing a number of general guarantees which are applicable to both types of proceedings,[175] before providing for additional guarantees in subsequent clauses for individuals facing criminal charges.[176]

Both Article 6(1) of the ECHR and Article 14(1) of the ICCPR provide that, in the determination of an individual's civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing by an independent and impartial

[172] Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial* (90th session, 23 August 2007) UN Doc. CCPR/C/GC/32, para 3.
[173] *Dombo Beheer B.V. v. The Netherlands* (App. no. 14448/88) ECtHR, 27 October 1993, para 32. The Court has also held that the requirements of Article 6 in cases concerning civil rights are less onerous than they are for criminal charges. See *König v. Germany* (App. no. 6232/73) ECtHR, 28 June 1978, para 96.
[174] ibid. See also *Jokela v. Finland* (App. no. 28856/95) ECtHR, 21 May 2002, para 68; *Levages Prestations Services v. France* (App. no. 21920/93) ECtHR, 23 October 1996, para 46; *Perić v. Croatia* (App. no. 34499/06) ECtHR, 27 March 2008, para 18.
[175] Art. 6(1) ECHR; Art. 14(1) ICCPR.
[176] Art. 6(2) & (3) ECHR; Art. 14(2) & (3) ICCPR.

tribunal.[177] Representing the only expressly qualified provision of the right to a fair trial, both Article 6(1) of the ECHR and Article 14(1) of the ICCPR provide that judgments should be public, but the press and public may be excluded from all or part of a trial in the interests of, *inter alia*, public order or national security in a democratic society.

The additional guarantees under Article 6(2) and (3) of the ECHR and Article 14(2) and (3) of the ICCPR only apply to criminal proceedings. These clauses provide for the rights to be presumed innocent;[178] to be informed promptly of the nature of the charges in a language which the defendant understands;[179] to have adequate time and facilities for the preparation of the defence;[180] to defend oneself in person or through legal assistance of choice or, if the defendant does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;[181] to examine or to have examined on one's behalf the witnesses used against oneself, and to obtain the attendance and examination of witnesses under the same conditions;[182] and to have the free assistance of an interpreter.[183] Article 14(3) of the ICCPR goes slightly further than the ECHR and expressly guarantees the right to be tried without undue delay,[184] and the right not to be compelled to testify against oneself or to confess guilt.[185] Additionally, both the ECHR and the ICCPR provide for the

[177] Note also Art. 47 of the EU Charter on Fundamental Rights. However, the applicability of Art. 47 is not limited to proceedings involving the determination of matters involving civil rights and obligations or a criminal charge, but rather, when anyone's 'rights and freedoms guaranteed by the law of the Union are violated'.
[178] Art. 6(2) ECHR; Art. 14(2) ICCPR. Note also Art. 48(1) of the EU Charter on Fundamental Rights.
[179] Art. 6(3)(a) ECHR; Art. 14(3)(a) ICCPR. Note also European Parliament and Council Directives on the Right to Information, and the Right to Interpretation and Translation in Criminal Proceedings (n. 167).
[180] Art. 6(3)(b) ECHR. Art. 14(3)(b) ICCPR also provides for the right of the defendant to communicate with their counsel of choosing.
[181] Art. 6(3)(c) ECHR; Art. 14(3)(d) ICCPR.
[182] Art. 6(3)(d) ECHR; Art. 14(3)(e) ICCPR.
[183] Art. 6(3)(e) ECHR; Art. 14(3)(f) ICCPR. Note also European Parliament and Council Directive on the Right to Interpretation and Translation in Criminal Proceedings (n. 167).
[184] Art. 14(3)(c) ICCPR. Art. 6(1) of the ECHR does, however, provide that everyone is entitled to a hearing 'within a reasonable time'. The question of what is 'reasonable' is to be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case law, in particular the complexity of the case, the behaviour of the applicant and the conduct of the relevant authorities. See for example *Gurban v. Turkey* (App. no. 4947/04) ECtHR, 15 December 2015, para 39; *Kudla v. Poland* (App. no. 30210/96) ECtHR [GC], 26 October 2000, para 124; *H v. France* (App. no. 10073/82) ECtHR, 24 October 1989, para 50.
[185] Art. 14(3)(g) ICCPR.

prohibition of retroactive punishment (the prohibition of *ex post facto* law).[186] Finally, the ICCPR guarantees the right not to be tried twice for the same crime (the principle of *non bis in idem* or double jeopardy).[187]

Whilst proceedings concerning the determination of terrorism-related charges are undoubtedly 'criminal' in nature and thus attract the full range of protections and guarantees envisaged in the provisions just outlined, the task of determining the nature of other proceedings relating to terrorist activities not involving the determination of 'criminal charges' can prove more challenging. For the purposes of this study, one of the crucial questions is the correct characterisation of proceedings concerning counter-terrorist hybrid orders; that is, whether the proceedings leading to, or concerning the appeal against, the imposition of counter-terrorist hybrid orders are either 'criminal' or 'civil' in nature.[188]

The provisions of Article 6(1) of the ECHR do not provide any guidance on the issue of determining whether the proceedings are criminal or civil. As such, the ECtHR has had to address the question in a number of cases and has developed extensive jurisprudence. In some cases, identifying whether proceedings involve the determination of civil rights and obligations or a criminal charge can be extremely problematic. For example, States may classify certain proceedings as disciplinary in nature, as for instance in relation to military indiscipline, despite carrying objectives which are similar to the general goal of the criminal law.[189] Additionally, States may decriminalise certain conduct with the purported aim of serving the interests of individuals and advancing the proper administration of justice, but these attempts may undermine the object and purpose of the ECHR.[190]

[186] Art. 7(1) ECHR; Art. 15(1) ICCPR. Note also Art. 49 of the EU Charter on Fundamental Rights.
[187] Art. 14(7) ICCPR. Note also Art. 50 of the EU Charter on Fundamental Rights. Art. 4 of Additional Protocol No. 7 to the ECHR guarantees the same principle, whilst Art. 2 provides for the right for people convicted of a criminal offence to appeal to a higher tribunal. However, as of December 2016, the UK is the only contracting State that has not signed the Additional Protocol.
[188] Art. 6(1) ECHR; Art. 14(1) ICCPR.
[189] *Engel and others v. The Netherlands* (App. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) ECtHR, 8 June 1976, para 79.
[190] *Öztürk v. The Federal Republic of Germany* (App. no. 8544/79) ECtHR, 21 February 1984, para 49.

The leading case on this overarching issue, *Engel v. The Netherlands*, decided by the European Court in 1976, laid down the test for establishing whether proceedings amount to the determination of a criminal charge.[191] The case concerned five enlisted soldiers who were subjected to various penalties for indiscipline and subordination. The offences were classified as a disciplinary matter under Dutch law. However, the ECtHR laid down a three-stage test for determining whether proceedings amount to the determination of a criminal charge, in turn addressing the domestic classification of the offence, the nature of the offence and the nature and degree of severity of the penalty.[192] Although in *Engel* the ECtHR was confronted with military disciplinary law and 'offences' committed by the applicants, the three-stage test is applicable beyond the narrow setting of the distinction between military disciplinary proceedings and criminal proceedings. Rather, as jurisprudence reveals, the three-stage test is vital when drawing the distinction between proceedings which are criminal, and those proceedings which are disciplinary, administrative, or otherwise invoke the civil limb of the right to a fair trial.

2.2.1 The Domestic Classification of the Proceedings

The first *Engel* criterion concerns the determination of whether the domestic provision defining the offence, or more generally the proscribed conduct in question, belongs to the criminal law.[193] If the domestic law characterises something as falling within the criminal law, then the matter of whether the relevant proceedings import the maximum fair trial guarantees under Article 6 is straightforward, regardless of the severity of the penalty.[194] The

[191] *Engel v. The Netherlands* (n. 189).
[192] ibid, para 82.
[193] ibid. The Court stated 'it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently'.
[194] *Öztürk v. The Federal Republic of Germany* (n. 190) para 54. The Court held that 'the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character'.

situation is somewhat more complex when the legal classification in the domestic system is ambiguous or when the classification is subject to various interpretations.[195]

Even so, the Court has insisted that the domestic classification of the conduct at issue is merely a starting point, as the State's classification will be examined in light of comparable standards in other contracting States.[196] As such, the ECtHR has made it clear that the classification of the proceedings under national law is indicative at best, whereas the nature of the offence or conduct in question is a much more significant factor.[197] The Court will thus sometimes look beyond the label that a State attaches to certain conduct, and focus more upon the true nature of the offence or conduct in question, and the attached penalty or sanction. As will become clear later, the second and third criterion are extremely significant when determining whether proceedings concerning counter-terrorist hybrid orders should be considered as criminal or civil in nature.[198]

Before examining these two elements, it is important to note that the second and third criterion of the *Engel* test can be alternative and not necessarily cumulative.[199] On the other hand, the Court has found that a cumulative approach may be necessary where separate analysis of each criterion is inadequate.[200] As a result, it is clear that in certain circumstances, even when a State classifies a measure as civil in the domestic law, the relevant proceedings may import the fair trial guarantees which are reserved for criminal trials due to the nature and severity of the penalty.[201]

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[195] *Ravnsborg v. Sweden* (App. no. 14220/88) ECtHR, 23 March 1994.
[196] *Engel v. The Netherlands* (n. 189) para 82.
[197] ibid. See also *Demicoli v. Malta* (App. no. 13057/87) ECtHR, 27 August 1991, para 33; *Weber v. Switzerland* (App. no. 11034/84) ECtHR, 22 May 1990, para 32; *Öztürk v. The Federal Republic of Germany* (n. 190) para 52.
[198] See Chapter 3, section 3.4.1.
[199] *Lutz v. Germany* (App. no. 9912/82) ECtHR, 25 August 1987, para 55. See also *Öztürk v. The Federal Republic of Germany* (n. 190) para 54.
[200] *Ezeh and Connors v. UK* (App. nos. 39665/98; 40086/98) ECtHR [GC], 9 October 2003, para 86. See also *Bendenoun v. France* (App. no. 12547/86) ECtHR, 24 February 1994, para 47; *Benham v. UK* (App. no. 19380/92) ECtHR [GC], 10 June 1996, para 56; *Garyfallou AEBE v. Greece* (App. no. 18996/91) ECtHR, 24 September 1997, para 33.
[201] The Human Rights Committee (HRC) has adopted a similar approach. See HRC, *General Comment No. 32* (n. 172) para 15. The HRC has emphasised that if disciplinary measures carried

2.2.2 The Nature of the Offence

The second *Engel* criterion concerns the nature of the offence or the conduct in question.[202] Amongst other things, the ECtHR has attached significant weight to whether the conduct in question could be committed by any member of the public, or only by a particular group or profession which would indicate it amounted to a disciplinary matter, and therefore outside the scope of Article 6.[203]

For example, when a journalist was found guilty for breach of privilege after publishing a defamatory article criticising two MPs, the ECtHR noted that the alleged offence 'potentially affects the whole population since it applies whether the alleged offender is a Member of the House or not and irrespective of where in Malta the publication of the defamatory libel takes place'.[204] Elsewhere, when a journalist was issued with a fine for disclosing documents concerning a defamation case at a press conference, the ECtHR found that since the alleged offence 'potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a "criminal" one for the purposes of the second criterion'.[205] Similarly, in a case of careless driving, the Court noted that the offence was potentially committable by all citizens in their capacity as road users.[206]

In addition, the Court may reflect on comparable practices in other Member States of the Council of Europe (CoE). For example, the ECtHR has found that a law sanctioning improper statements made to a court by people taking part in judicial proceedings was a common practice amongst European States, as such rules were necessary for a court to

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sanctions which were penal in nature, this would amount to the determination of a criminal charge for the purposes of Article 14 of the ICCPR. See *Paul Perterer v. Austria*, HRC (Com. no. 1015/2001, 81st session, 20 August 2004) UN Doc. CCPR/C/81/D/1015/2001, para 9.2.

[202] *Engel v. The Netherlands* (n. 189) para 82.

[203] In this regard, the ECtHR has suggested that 'Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct'. See *Weber v. Switzerland* (n. 197) para 33.

[204] *Demicoli v. Malta* (n. 197) para 33.

[205] *Weber v. Switzerland* (n. 197) para 33.

[206] *Öztürk v. The Federal Republic of Germany* (n. 190) para 53.

'ensure the proper and orderly functioning of its own proceedings'.[207] Finally, and crucially for the purposes of this thesis, the Court may also consider whether the proceedings in question are brought by a 'public authority under statutory powers of enforcement', as transpired for example, when an individual refused to pay a tax to a local council.[208]

2.2.3 The Nature and Degree of Severity of the Penalty

The third *Engel* criterion concerns the 'degree of severity of the penalty that the person concerned risks incurring'.[209] This has perhaps proven the most important and the most difficult of the three elements. Even if the offence or proscribed conduct is found not to be criminal in nature, the nature and degree of severity of the penalty may bring the matter into the criminal sphere.[210] For example, the Court has attached significant weight to whether the penalty carries a punitive or deterrent purpose.[211]

Additionally, the Court has held on numerous occasions that the nature and severity of a penalty is determined by reference to the maximum penalty which the law provides.[212] At the most extreme end of the spectrum of possible penalties, the ECtHR has found that in instances involving the deprivation of liberty, the nature and degree of severity of the penalty is such as to amount to criminal proceedings. In *Engel*, the Court held:

> In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental.[213]

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[207] *Ravnsborg v. Sweden* (n. 195) para 34.
[208] *Benham v. UK* (n. 200) para 56.
[209] *Engel v. The Netherlands* (n. 189) para 82.
[210] *Ravnsborg v. Sweden* (n. 195) para 35.
[211] *Öztürk v. The Federal Republic of Germany* (n. 190) para 53; *Bendenoun v. France* (n. 200) para 47.
[212] See for example *Ezeh and Connors v. UK* (n. 200) para 120; *Campbell and Fell v. UK* (App. nos. 7819/77; 7878/77) ECtHR, 28 June 1984, para 72; *Weber v. Switzerland* (n. 197) para 34.
[213] *Engel v. The Netherlands* (n. 189) para 82. The applicants faced confinement to a disciplinary unit for several months. The Court found that this made the measures fall within criminal proceedings.

Thus, the Court has found in the following circumstances, amongst others, that the proceedings were criminal in nature: the potential loss of a remission of sentence amounting to three years following misconduct in prison;[214] additional sentences of 40 days and 7 days for two prisoners following their misconduct;[215] a maximum penalty of 60 days imprisonment for an editor of a satirical magazine who published an article criticising two MPs;[216] a maximum penalty of three months' imprisonment for an individual who failed to pay a community charge;[217] and the possibility of one years imprisonment for the directors of a company in the event of non-payment of a fine.[218]

Apart from instances involving the deprivation of liberty, the ECtHR has considered other ways in which the nature and the severity of the penalty can bring the proceedings within the criminal sphere. For example, the Court has found that a fine imposed upon individuals for minor traffic offences was deterrent and punitive in nature and thus the penalty could be considered to be criminal;[219] and that banning individuals from taking up certain government positions in accordance with the policy of lustration was significantly serious enough to be considered a deterrent and punitive penalty.[220]

As such, if the offence or conduct in question carried a maximum penalty of lengthy imprisonment, it would be difficult to reject that the proceedings carry a 'criminal' aspect to it for the purpose of ascertaining which fair trial guarantees apply. Bearing in mind the

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However, the Court noted that three or four days light arrest would not amount to the deprivation of liberty (paras 61 & 85).

[214] *Campbell and Fell v. UK* (n. 212) para 72. According to the ECtHR: 'The maximum penalties which could have been imposed on him included forfeiture of all of the remission of sentence available to him at the time of the Board's award (slightly less than three years), forfeiture of certain privileges for an unlimited time and, for each offence, exclusion from associated work, stoppage of earnings and cellular confinement for a maximum of 56 days'.

[215] *Ezeh and Connors v. UK* (n. 200) para 128. The maximum number of additional days which could be awarded to each applicant by the governor was 42 for each offence.

[216] *Demicoli v. Malta* (n. 197) para 34. For an alleged breach of privilege, the maximum possible penalty was 60 days imprisonment or a fine of 500 Maltese Lira.

[217] *Benham v. UK* (n. 200) para 56.

[218] *Garyfallou AEBE v. Greece* (n. 200) paras 33-34. The applicant company faced a maximum financial penalty three times what it was actually fined, and in the event of non-payment, the seizure of company assets and the detention of company directors for up to one year.

[219] *Öztürk v. The Federal Republic of Germany* (n. 190) para 53.

[220] *Matyjek v. Poland* (App. no. 38184/03) ECtHR, Admissibility Decision, 30 May 2006.

discussion in this section, the next chapter will discuss how the practice of the UK courts is arguably inconsistent with the ECHR when it comes to classifying proceedings concerning the implementation of counter-terrorist hybrid orders, as the maximum penalties which can be imposed against individuals for breaching the conditions attached to the mechanisms might point towards them being treated as criminal proceedings.

2.3 Limitation Clauses

Before this chapter analyses the specific guarantees of the right to a fair trial in depth, it is important to note that the right to fair trial occupies a particularly odd position when it comes to determining the nature of the right itself. On the one hand, the right to a fair trial has been considered by some to be absolute when considered as a whole.[221] However, the ECtHR has been less emphatic, suggesting that 'Article 6 does not enshrine an absolute right'.[222]

What is more certain however is that some of the constituent guarantees of the right to a fair trial are not in themselves absolute and may in fact be restricted in certain circumstances. In that sense, the right to a fair trial might be best described as a 'limited right', as some fair trial guarantees can be limited pursuant to public good objectives or to protect the rights of others. Crucially, as already noted, the only fair trial guarantee which is expressly qualified concerns the publicity of proceedings.[223] Nevertheless, although Article 6 of the ECHR does not contain a specific 'claw-back' clause,[224] in contrast with other provisions concerning 'qualified rights',[225] the fact that other fair trial guarantees are inherently qualified and may be

[221] *Brown v. Stott* [2003] 1 AC 681, per Lord Hope at 719.
[222] *Gäfgen v. Germany* (App. no. 22978/05) ECtHR [GC], 1 June 2010, para 178.
[223] Art. 6(1) ECHR; Art. 14(1) ICCPR.
[224] See Higgins (n. 61).
[225] See, for example, the clauses contained in the second paragraphs of Arts. 8-11 of the ECHR.

balanced against other interests is uncontroversial and has been recognised by the ECtHR in a number of cases.[226]

For example, Lord Bingham held in *Brown v. Stott* that 'the jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute'.[227] Furthermore, Lord Bingham recognised that 'limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for'.[228] By way of example, and as will be considered in depth later, the ECtHR has noted that the right to the disclosure of evidence may be restricted due to the interests of national security, the need to safeguard secret methods of investigation, or to protect witnesses, which may be balanced against the defendant's right to full disclosure.[229] The ECtHR has also found that the right to access a court in civil trials is not absolute, since the right of access by its very nature calls for regulation by the State, which may vary in time and in place according to the needs and resources of the community and of individuals.[230]

As with any limitation, the ECtHR jurisprudence makes it clear that for an interference not to constitute a breach of a right, it has to satisfy three basic requirements; namely that it must be 'prescribed by law', pursue a 'legitimate aim', and be 'necessary in a democratic

[226] *Fayed v. UK* (App. no. 17101/90) ECtHR 21 September 1994, para 65. In the context of other Convention rights see the *'Belgian Linguistic Case'* (App. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) ECtHR, 23 July 1968, para 5; *Sporrong and Lönnroth v. Sweden* (App. nos. 7151/75; 7152/75) ECtHR, 23 September 1982, para 69.
[227] *Brown v. Stott* (n. 221) at 704.
[228] ibid.
[229] *Kennedy v. UK* (App. no. 26839/05) ECtHR, 18 May 2010, para 187; *Jasper v. UK* (App. no. 27052/95) ECtHR [GC], 16 February 2000, para 52; *Edwards and Lewis v. UK* (App. nos. 39647/98; 40461/98) ECtHR [GC], 27 October 2004, para 46; *Doorson v. The Netherlands* (App. no. 20524/92) ECtHR, 26 March 1996, para 70.
[230] See in particular *Golder v. UK* (App. no. 4451/70) ECtHR, 21 February 1975, para 38. See also *Ashingdane v. UK* (App. no. 8225/78) ECtHR, 28 May 1985, para 57; *Stanev v. Bulgaria* (App. no. 36760/06) ECtHR [GC], 17 January 2012, para 230; *Rowe and Davis v. UK* (App. no. 28901/95) ECtHR [GC], 16 February 2000, para 61.

society'.[231] For example, in *Tinnelly and Sons v. UK*, which concerned a dispute over a tendering process and alleged religious and political discrimination, the ECtHR held that a limitation upon the right to access a court will not be compatible with Article 6(1) 'if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[232]

Although not expressly stated in Article 6 of the ECHR or Article 14 of the ICCPR, the first condition in order to legally restrict the enjoyment of a right is that the interference with the right must be 'prescribed by law'.[233] In establishing whether this first requirement has been satisfied, the ECtHR has insisted that, in addition to there being a specific law which authorises the interference, the law must be adequately accessible, and it must be sufficiently precise to enable the individual to predict its applicability.[234]

The second condition in order to legally restrict the enjoyment of a right is that the interference with the right must pursue a legitimate aim.[235] As already alluded to, the ECHR and the ICCPR both expressly provide in similar terms that the press and public may be excluded from all or part of the trial in the interests of morals, public order, national security, in the interest of the private lives of the parties, or to the extent strictly required where publicity would prejudice the interests of justice.[236] This is, however, the extent to which the

[231] The requirements for limiting rights under the ICCPR are almost identical. See United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (UN Doc. E/CN.4/1985/4, 41st session, 28 September 1984) (the 'Siracusa Principles'). For commentary see D. O'Donnell, 'Commentary by the Rapporteur on Derogation' (1985) 7 *Human Rights Quarterly* 23.

[232] *Tinnelly and Sons Ltd and others and McElduff and others v. UK* (App. no. 20390/92) ECtHR, 10 July 1998, para 72.

[233] Siracusa Principles (n. 231) paras 5 & 15-18.

[234] In proceedings not concerning the right to a fair trial see, for example, *The Sunday Times v. UK* (App. no. 6538/74) ECtHR, 26 April 1979, para 49; *Malone v. UK* (App. no. 8691/79) ECtHR, 2 August 1984, para 66; *Hasan and Chaush v. Bulgaria* (App. no. 30985/96) ECtHR [GC], 26 October 2000, para 84; *Rotaru v. Romania* (App. no. 28341/95) ECtHR [GC], 4 May 2000, para 52.

[235] See for example *Golder v. UK* (n. 230) para 37; *Omar v. France* (App. no. 24767/94) ECtHR [GC], 29 July 1998, para 34; *Fayed v. UK* (n. 226) para 65; *Bellet v. France* (App. no. 23805/94) ECtHR, 4 December 1995, para 31. See also the Siracusa Principles (n. 231) paras 6 & 10.

[236] Art. 6(1) ECHR; Art. 14(1) ICCPR. The ICCPR goes further with trials concerning juveniles and families. Whereas the ECHR includes the interests of juveniles in general terms as a legitimate aim for the exclusion of the press or public, the ICCPR provides that 'any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children'.

right to a fair trial expressly provides for restrictions with a number of legitimate aims proscribed.

Inherent to the second condition, the limiting measures must be rationally connected to the achievement of the objective being pursued, based upon objective considerations.[237] In other words, the measures must advance and work towards the objective being pursued, such as safeguarding national security. For example, in certain disciplinary proceedings, the ECtHR has held that national security and public order considerations do allow proceedings to be heard *in camera*.[238] Similarly, as noted earlier, the ECtHR has found that the disclosure of evidence can be restricted in criminal trials in the interests of national security, the need to safeguard secret methods of investigation or to protect witnesses.[239]

Perhaps the most troublesome of the three conditions which must be satisfied in order to lawfully restrict the enjoyment of a right is that the interference must be 'necessary in a democratic society'.[240] Although, again, this requirement is not expressly contained within the provisions of the right to a fair trial,[241] the ECtHR has insisted that any measures which restrict the rights of the defence should be 'strictly necessary' and that if a less restrictive measure can suffice then that measure should be applied.[242] Moreover, the third condition is expressly contained within the provisions of 'qualified rights', and as such, the ECtHR has amassed much jurisprudence on the matter. In ascertaining whether a restriction is necessary, the ECtHR has insisted that the interference must correspond to a pressing

[237] Siracusa Principles (n. 231) para 10.
[238] *Campbell and Fell v. UK* (n. 212) paras 86-88.
[239] *Kennedy v. UK* (n. 229) para 187; *Jasper v. UK* (n. 229) para 52; *Edwards and Lewis v. UK* (n. 229) para 46; *Rowe and Davis v. UK* (n. 230) para 61*; Doorson v. The Netherlands* (n. 229) para 70.
[240] Siracusa Principles (n. 231) paras 10 & 19-21.
[241] However, this is with the exception of the possibility to restrict the publicity of the trial in the interests of national security in a democratic society.
[242] *Van Mechelen v. The Netherlands* (App. nos. 21363/93; 21364/93; 21427/93; 22056/93) ECtHR, 23 April 1997, para 58; *Rowe and Davis v. UK* (n. 230) para 61; *Visser v. The Netherlands* (App. no. 26668/95) ECtHR, 14 February 2002, para 43; *Marcello Viola v. Italy* (App. no. 45106/04) ECtHR, 5 October 2006, para 62. The ECtHR later added that a similar approach applies in the context of civil proceedings. See *Kennedy v. UK* (n. 229) para 184. See also Siracusa Principles (n. 231) para 11.

social need.[243] Accordingly, when evaluating the pressing social need at stake, the Court has asserted that the interference must be proportionate to the legitimate aim being pursued.[244] Finally, States are granted a margin of appreciation when the Court assesses whether a restriction upon a fair trial guarantee is necessary, although this has mostly arisen in cases concerning access to court.[245] However, the Court has also emphasised that such limitations must not restrict the exercise of the right in such a way or to such extent that the very essence of the right is impaired.[246] Finally, restrictions upon the right to a fair trial must also be non-discriminatory.[247]

2.4 Substantive Fair Trial Guarantees

2.4.1 The Fairness of Proceedings

Although the notion of 'fairness' represents an obviously overarching requirement of the right to a fair trial, the various courts have never offered a decisive definition of the concept. Rather, under the common law, the general concept of 'fairness' encapsulates a flexible standard.[248] Lord Mustill in the House of Lords has remarked that the standards of fairness

[243] *Handyside v. UK* (App. no. 5493/72) ECtHR, 7 December 1976, paras 48-49; *The Sunday Times v. UK* (n. 234) para 59; *Dudgeon v. UK* (App. no. 7525/76) ECtHR [GC], 22 October 1981, para 51. The Court has suggested that 'necessary' in this context 'does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question'.

[244] *Fayed v. UK* (n. 226) para 65; *Bellet v. France* (n. 235) para 31; *Levages Prestations Services v. France* (n. 174) para 40. The HRC has noted that 'the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect'. See *Rafael Marques de Morais v. Angola*, HRC (Com. no. 1128/2002, 83rd session, 18 April 2005) UN Doc. CCPR/C/83/D/1128/2002, para 6.8.

[245] *Ashingdane v. UK* (n. 230) para 57; *Fayed v. UK* (n. 226) para 65. In cases not concerning Article 6 see *The Sunday Times v. UK* (n. 234) para 59. See also Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) ch 3 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 6 (Right to a Fair Trial)'.

[246] *Tinnelly and Sons Ltd and McElduff v. UK* (n. 232) para 72; *Guérin v. France* (App. no. 25201/94) ECtHR [GC], 29 July 1998, para 37; *Bellet v. France* (n. 235) para 31; *Ashingdane v. UK* (n. 230) para 57; *Stanev v. Bulgaria* (n. 230) para 230; *Fayed v. UK* (n. 226) para 65. See also Siracusa Principles (n. 231) para 2.

[247] Siracusa Principles (n. 231) para 9.

[248] Clayton & Tomlinson (n. 163) 32.

are not immutable and change over time, both in their application and in particular cases.[249] More recently, Lord Bingham reiterated the flexibility of the concept and suggested that 'fairness is a constantly evolving concept…it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another'.[250] This arguably reflects the approach of the UK domestic courts towards the classification of proceedings, which is deemed a less important issue than the question of what protections are required to ensure a fair hearing overall. The ECtHR has also emphasised that 'what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case'.[251]

As such, to get a better understanding of what the requirement of 'fairness' entails in all proceedings, it is useful to look more closely at the common law which has provided an abundance of jurisprudence, not least of all regarding the principle of natural justice.[252] Additionally, it is important to note that the concept of 'fairness' and the principle of natural justice have been pivotal to proceedings in the UK for centuries, and in any case, long before the drafting of the ECHR.

The principle of natural justice is itself an umbrella concept, encapsulating further principles such as the rule against bias, meaning that nobody can be a judge in their own cause (*nemo judex in causa sua*), and the right to be heard (*audi alteram partem*).[253] Of these two rules, the most significant for the purposes of this study concerns the right to be heard. In *Kanda v. Government of the Federation of Malaya*, which concerned the dismissal proceedings of a police officer, Lord Denning in the Privy Council held that the right to be heard was one of

[249] *R v. SSHD ex parte. Doody et al* [1994] 1 AC 531, at 560.
[250] *R v. H* [2004] UKHL 3, [2004] 2 AC 134, at 11.
[251] *Ibrahim and others v. UK* (App. nos. 50541/08; 50571/08; 50573/08; 40351/09) ECtHR [GC], 13 September 2016, para 250. See also *O'Halloran and Francis v. UK* (App. nos. 15809/02; 25624/02) ECtHR [GC], 29 June 2007, para 53.
[252] For an overview of common law jurisprudence in the context of 'secret evidence' see Metcalfe, 'Secret Evidence' (n. 99).
[253] *Kanda v Government of the Federation of Malaya* [1962] AC 322, at 337. See also H. W. R. Wade & C. F. Forsyth, *Administrative Law* (OUP, 11th ed, 2014) ch 12 'Natural Justice and Legal Justice', ch 13 'The Rule Against Bias' and ch 14 'The Right to a Fair Hearing'; M. Beloff, 'Natural Justice – (The *Audi Alteram Partem* Rule) and Fairness' in M. Supperstone & J. Goudie (eds) *Judicial Review* (Butterworths, 2nd ed, 1997).

the essential characteristics of natural justice, but one which demanded additional complementing guarantees.[254] In the oft-cited passage, Lord Denning expanded:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them…It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.[255]

On the principle of natural justice more broadly, in *Re: K*, a wardship case which involved material not disclosed to the parties, Upjohn LJ held that:

> [A] person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.[256]

As such, the principle of natural justice and the right to be heard in particular must entail the right to confront one's accuser, to know the charges, and to confront the witnesses which the other party call upon.[257]

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[254] *Kanda v Government of the Federation of Malaya* (n. 253).
[255] ibid, 337.
[256] *Official Solicitor v. K* [1963] Ch 381, at 405-406.
[257] See, for example, *Fenwick's case*, in which Shower J held that 'our constitution is that the person shall see his accuser'. See *Fenwick's case*, 13 How. St. Tr. 537, at 591-592 (H. C. 1696) as

The ECtHR has enthusiastically expounded the importance of the right to a fair trial and stressed that the right holds such a prominent place in democratic society that Article 6(1) cannot be interpreted restrictively,[258] and more importantly, that the right to a fair trial under Article 6 is an unqualified right.[259] Having said that, the ECtHR has been generally unwilling to dictate what form proceedings must take in contracting States in order to be considered fair. Rather, the Court has repeatedly asserted that contracting States enjoy a wide discretion in the form of proceedings implemented in domestic courts, and the Court will not indicate those means but instead determine whether the result called for by the Convention has been achieved.[260]

Despite what appears to be a lack of certainty over what the concept of 'fairness' entails, the ECtHR has, however, insisted that proceedings as a whole must be fair in order to satisfy the requirements of Article 6(1).[261] In that regard, a defect which occurs during the proceedings may be remedied at a later stage, as for example, in an appeal.[262] However, a critical incident such as the denial of access to a lawyer in pre-trial detention may be decisive when determining if an individual's right to a fair trial has been violated.[263]

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referenced in Metcalfe, 'Secret Evidence' (n. 99) para 41. In *Duke of Dorset v. Girdler*, the Court of Chancery held that 'the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering of the truth'. See *Duke of Dorset v. Girdler* (1720) Prec. Ch. 531-532, 24 ER 238 as referenced in Metcalfe, 'Secret Evidence' (n. 99) para 41. See also *Ridge v. Baldwin* [1964] AC 40, at 113-114 per Lord Morris; *Re D (Minors) (Adoption Reports: Confidentiality)* [1995] 3 WLR 483, [1996] AC 593, at 603-604 per Lord Mustill.

[258] *Delcourt v. Belgium* (App no. 2689/65) ECtHR, 17 January 1970, para 25. See also *Perez v. France* (App no. 47287/99) ECtHR [GC], 12 February 2004, para 64.

[259] See for example *Ibrahim v. UK* (n. 251) para 250; *O'Halloran and Francis v. UK* (n. 251) para 53.

[260] *Vaudelle v. France* (App. no. 35683/97) ECtHR, 30 January 2001, para 57; *Colozza v. Italy* (App. no. 9024/80) ECtHR, 12 February 1985, para 30; *De Cubber v. Belgium* (App. no. 9186/80) ECtHR, 26 October 1984, para 35; *Quaranta v. Switzerland* (App. no. 12744/87) ECtHR, 24 May 1991, para 30.

[261] See for example *Monnell and Morris v. UK* (App. nos. 9562/81; 9818/82) ECtHR, 2 March 1987, para 56; *Dombo Beheer B.V. v. The Netherlands* (n. 173) para 31; *Ankerl v. Switzerland* (App. no. 17748/91) ECtHR, 23 October 1996, para 38.

[262] Interights (n. 163) 33. See for example *Adolf v. Austria* (App. no. 8269/78) ECtHR, 26 March 1983, paras 38-41; *De Cubber v. Belgium* (n. 260) para 33.

[263] Interights (n. 163) 33. See for example *Salduz v. Turkey* (App. no. 36391/02) ECtHR [GC], 27 November 2008, para 58.

2.4.2 The Right to a Public Hearing

The right to a public hearing is the first express guarantee pertaining to the right to a fair trial under Article 6(1) of the ECHR.[264] In a manner which is comparable to the development of the overarching concept of 'fairness', the common law has been extremely influential in shaping what the right to a public hearing entails. As such, to get a better understanding of what the requirement of a 'public hearing' entails, it is useful to look more closely at the common law which has, again, provided an abundance of jurisprudence. In this respect, underlying the right to a public hearing is the principle of 'open justice' which essentially provides that court proceedings and the judgment must, in general, be public and available to all.

The principle of open justice was notably discussed in *Scott v. Scott*, where the House of Lords considered a divorce process in which the Probate, Divorce and Admiralty Division had made an order for the suit to be heard *in camera*.[265] After the suit had concluded, the wife disseminated the transcript of the hearing to three people in an attempt to defend her reputation.[266] The House of Lords held that the order for the *in camera* hearing was unlawful, and that even if such an order was valid, it did not prevent the lawful dissemination of the transcript of the hearing.

Lord Shaw's damning judgment of the *in camera* hearing is still today often cited in trials involving matters of national security and secrecy. Lord Shaw held that the entire process was 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security', confessing that the whole proceeding shocked him.[267]

[264] Art. 6(1) ECHR; Art. 14(1) ICCPR.
[265] *Scott v. Scott* (1913) AC 417.
[266] ibid. The husband then motioned that the wife should be charged with contempt of court.
[267] ibid, 476.

However, Lord Shaw's opinion is most notable for his references to the writings of the philosopher Jeremy Bentham and the historian Henry Hallam. Lord Shaw first quoted Bentham who wrote that '[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice'.[268] Going further, he added that 'publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial'.[269] Following these references, Lord Shaw quoted Hallam who wrote that 'civil liberty in this kingdom has two distinct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances'.[270] Finally, Lord Shaw added that if the *in camera* order was allowed to stand and contempt of court was found, then it would 'be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law'.[271]

In *Attorney General v. Leveller Magazine*, Lord Diplock held that open justice had two aspects; first, that proceedings 'should be held in open court to which the press and public are admitted' and that in criminal cases 'all evidence communicated to the court is communicated publicly', and secondly, that nothing should be done to discourage the wide and accurate public reporting of proceedings.[272] The importance of the principle of open justice was also stressed by Lord Woolf in *R v. Legal Aid Board, Ex parte Kaim Todner (A*

[268] ibid, 477.
[269] ibid.
[270] ibid.
[271] ibid, 484.
[272] A number of journalists had published the name of a witness who was a member of the Security Service, despite a court order providing that the identity of the individual must not be disclosed. The journalists were found guilty of contempt of court but their appeal to the House of Lords was successful. *Attorney General v. Leveller Magazine* [1979] AC 440, at 449-450.

Firm).[273] Lord Woolf identified a number of reasons why proceedings should be subjected to the full glare of a public hearing: it deters inappropriate behaviour by the court; it maintains the public's confidence in the administration of justice; it enables the public to know that justice is being administered impartially; it can result in evidence becoming available which would not be the case behind closed doors or with anonymous parties; and it makes uninformed and inaccurate comment about court proceedings less likely.[274]

Expanding upon the first of Lord Woolf's reasons in *Ex Parte Guardian Newspapers*, Brooke LJ held on behalf of the Court of Appeal:

> Open justice promotes the rule of law. Citizens of all ranks in a democracy must be subject to transparent legal restraint, especially those holding judicial or executive offices. Publicity, whether in the courts, the press or both, is a powerful deterrent to abuse of power and improper behaviour.[275]

Another important aspect of the principle of open justice is the legal maxim that not only must justice be done but it must also be seen to be done. For example, in *R v. Sussex Justices ex parte McCarthy*, which concerned a charge of dangerous driving in which the clerk to the justices was also employed by a solicitors firm bringing a compensation claim against the driver, Lord Hewart held that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[276] More recently, the maxim was pivotal to the House of Lords' unprecedented decision to set aside the order of an earlier bench of the House of Lords which granted the request for Chilean dictator Augusto Pinochet to be extradited to

[273] The case concerned the Legal Aid Board's decision to terminate a law firm's franchise after allegations of dishonesty, and that firm's request to remain anonymous during the proceedings to protect its reputation. *R v. Legal Aid Board, Ex parte Kaim Todner (A Firm)* [1998] 3 WLR 925, [1999] QB 966.
[274] ibid, 977.
[275] The case concerned an appeal against the decision to hold an *in camera* hearing into a claim of abuse of process, *Ex Parte Guardian Newspapers* [1999] 1 All ER 65, [1999] 1 WLR 2130, at 2144.
[276] *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256, at 259. See also *Hobbs v. Tinling and Company Limited* [1929] 2 KB 1, at 48.

Spain.[277] It was argued, and accepted by the second House of Lords bench, that Lord Hoffmann's links to Amnesty International raised concerns as to the impartiality of the first bench, which would damage the public confidence in the integrity of the administration of justice.[278]

The ECtHR has reinforced the importance of a public trial, emphasising that the 'public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6'.[279] For example, in *Diennet v. France*, the Court held that publicity 'protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained'.[280] Furthermore, the Court found that 'by rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 para. 1…namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention'.[281]

However, as alluded to earlier, the right to a public hearing is the only fair trial guarantee which is expressly recognised as being subject to limitations.[282] Of particular relevance for the purpose of this study is the fact that Article 6(1) ECHR and Article 14(1) ICCPR allow the public to be excluded from all or part of the trial in the interests of *inter alia* national security in a democratic society.[283]

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[277] *R v. Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet* (*Pinochet No. 2*) [2000] 1 AC 119, [1999] 1 All ER 577.
[278] ibid. See in particular the judgments of Lord Browne-Wilkinson (paras 125-138) and Lord Hope (paras 140-144). The ECtHR has also had to contend with the principle. See *Piersack v. Belgium* (App. no. 8692/79) ECtHR, 1 October 1982, para 31.
[279] *A.T. v. Austria* (App. no. 32636/96) ECtHR, 21 March 2002, para 35. See also *Diennet v. France* (App. no. 18160/91) ECtHR, 26 September 1995, para 33; *Schuler-Zgraggen v. Switzerland* (App. no. 14518/89) ECtHR, 24 June 1993, para 58.
[280] ibid.
[281] ibid. See also more recently *Artemov v. Russia* (App. no. 14945/03) ECtHR, 3 April 2014; *Starokadomskiy v. Russia (No. 2)* (App. no. 27455/06) ECtHR, 13 March 2014, para 51; *Pichugin v. Russia* (App. no. 38623/03) ECtHR, 23 October 2012, para 185.
[282] See above, section 2.3.
[283] Art. 6(1) ECHR allows the press and public to be excluded 'in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in

For example, in *B and P v. UK*, which concerned a dispute about child custody in which the press and public were excluded, the ECtHR acknowledged that the requirement to hold a public hearing is subject to exceptions.[284] The Court held:

> This is apparent from the text of Art 6(1) itself… Moreover, it is established in the Court's case-law that, even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Art 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.[285]

In the same passage, the Court referred to a number of previous judgments on the matter. In *Doorson v. The Netherlands* which concerned anonymous witnesses in a drug trafficking case, the ECtHR found in that case that 'principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'.[286] The Court also cited *Jasper v. UK* which similarly concerned drug trafficking, in which the ECtHR held that 'in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused'.[287]

Thus, it is evident that the general entitlement to a public hearing can be subject to exceptions.[288] Trials dealing with alleged terrorism offences or terrorist threats have the

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special circumstances where publicity would prejudice the interests of justice'. Art. 14(1) ICCPR goes slightly further in respect of juveniles and family matters. See above n. 236.

[284] *B and P v. UK* (App nos. 36337/97; 35974/97) ECtHR, 24 April 2001, para 37.

[285] ibid.

[286] *Doorson v. The Netherlands* (n. 229) para 70.

[287] *Jasper v. UK* (n. 229) para 52. See also *Z v. Finland* (App. no. 22009/93) ECtHR, 25 February 1997, para 99.

[288] The HRC has also acknowledged that the right to a public hearing can be subject to exceptions. For example, in *Z. P. v. Canada*, which concerned a complaint that a rape trial was unfair as it was held before a single judge, the Canadian government argued that the 'public may be excluded from all or part of a trial for reasons of morals – a request frequently made and granted in sexual abuse cases'. See *Z. P. v. Canada*, HRC (Com. no. 341/1988, 41st session, 11 April 1991) UN Doc.

obvious potential to affect a variety of issues which may necessitate restricting the right to a public hearing. The need to protect witnesses or undercover agents are just two examples when the overarching concern of national security could legitimately restrict the right to a public hearing.

Although the requirement that judgments should generally be publicly available undoubtedly helps to ensure transparency and inspire confidence in the judicial system, the provisions in Article 6 of the ECHR and Article 14 of the ICCPR do not address what is required in the actual court judgments. However, individuals are entitled to another closely related fair trial guarantee, the right to a 'reasoned judgment', which assists in the desired objective of the court to ensure the proper administration of justice.[289] In essence, the courts are required to provide sufficient reasons for their decisions.[290] However, the extent of this duty may vary according to the nature of the decision and circumstances of the case,[291] which does not require a detailed answer to every argument.[292]

2.4.3 The Equality of Arms and the Right to an Adversarial Trial

Although not being specifically guaranteed in the text of Article 6 of the ECHR or Article 14 of the ICCPR, the equality of arms represents one of the most significant aspects of the right to a fair trial in criminal proceedings. Similarly, although not being expressly guaranteed in either treaty, the equality of arms closely overlaps with the right to an adversarial trial in criminal proceedings which is a trial characteristic most prevalent in common law systems.

CCPR/C/41/D/341/1988, para 4.6. Nevertheless, the Committee has stated that '[e]ven in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children'. See HRC, *General Comment No. 32* (n. 172) para 29.

[289] *Papon v. France* (App. no. 54210/00) ECtHR, Admissibility Decision, 15 November 2001.

[290] See, for example, *H v. Belgium* (App. no. 8950/80) ECtHR, 30 November 1987, para 53; HRC, *General Comment No. 32* (n. 172) para 29.

[291] *Ruiz Torija v. Spain* (App. no. 18390/91) ECtHR, 9 December 1994, para 29; *Higgins and Others v. France* (App. no. 20124/92) ECtHR, 19 February 1998, para 42.

[292] *Van de Hurk v. The Netherlands* (App. no. 16034/90) ECtHR, 19 April 1994, para 61; *García Ruiz v. Spain* (App. no. 30544/96) ECtHR [GC], 21 January 1999, para 26.

The European Commission of Human Rights (ECmHR) first took the initiative in expanding the rights afforded to the accused in this regard in *Ofner and Hopfinger v. Austria*.[293] The ECmHR found that 'what is generally called the "equality of arms", that is the procedural equality of the accused with the public prosecutor, is an inherent element of a "fair trial".'[294] The ECtHR confirmed the approach of the ECmHR in subsequent criminal cases, holding that the 'principle of equality of arms…is only one feature of the wider concept of fair trial by an independent and impartial tribunal'.[295]

In terms of what the equality of arms actually entails, the ECtHR has held that the principle implies that 'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[296]

The similarities and overlaps between the right to an adversarial trial and the equality of arms are clearly apparent. Under the common law, the right to an adversarial trial has been safeguarded for centuries. For example, in *Randall v The Queen*, which concerned a theft trial and the conduct of the prosecution counsel, Lord Bingham who delivered the judgment on behalf of the Privy Council stated that:

> A contested criminal trial on indictment is adversarial in character…The adversarial format of the criminal trial is indeed directed to ensuring a fair

[293] *Ofner and Hopfinger v. Austria* (App. nos. 524/59; 617/59) ECmHR, 23 November 1962. This was the first time an organ expanded the rights of the accused by referring to the 'residual meaning of fair trial, rather than to any of the more detailed guarantees of Art. 6'. See S. Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers, 1993) 52.
[294] *Ofner and Hopfinger v. Austria* (n. 293) 78.
[295] *Delcourt* v *Belgium* (n. 258) para 28. See also *Kress v. France* (App. no. 39594/98) ECtHR [GC], 7 June 2001, para 72; *Bonisch v. Austria* (App. no. 8658/79) ECtHR, 6 May 1985, para 32; *Zhuk v. Ukraine* (App. no. 45783/05) ECtHR, 21 October 2010, para 25.
[296] *Andrejeva v. Latvia* (App. no. 55707/00) ECtHR [GC], 18 February 2009, para 96; *Dombo Beheer B.V. v. The Netherlands* (n. 173) para 33; *Kennedy v. UK* (n. 229) para 184; *Gorraiz Lizarraga and others v. Spain* (App. no. 62543/00) ECtHR, 27 April 2004, para 56. See also HRC, *General Comment No. 32* (n. 172) para 13.

> opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence.[297]

Just as the ECtHR has emphasised that the equality of arms is an integral aspect of the right to a fair trial, the Court has also stressed the importance of adversarial proceedings, holding that 'independently of whether the case is a civil, criminal or disciplinary one, the right to adversarial proceedings has to be complied with'.[298] Moreover, the ECtHR has clarified what the right to an adversarial trial entails, holding that in criminal cases, both the 'prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party'.[299]

However, the rights to the equality of arms and an adversarial trial have been found to be subject to restrictions and the ECtHR has had to deal with this on a number of occasions. The right to be informed of the allegations and to access evidence are particular aspects of the right to a fair trial which have been especially problematic in terrorism trials and when matters of national security are concerned. One of the leading cases on the matter, *Rowe and Davis v. UK*, concerned the convictions of three men, known as the 'M25 Three' due to the locations of the crimes.[300] The trio appealed to the ECtHR alleging violations of Article 6(1), 6(3)(b) and 6(3)(d) due to the non-disclosure of certain evidence at their trial. The Court effectively summarised the combined guarantees of the equality of arms and the right to an adversarial trial:

> It is a fundamental aspect of the right to a fair trial that criminal proceedings…should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial

[297] *Randall v. The Queen* [2002] UKPC 19 (Privy Council).
[298] *Vanjak v. Croatia* (App. no. 29889/04) ECtHR, 14 January 2010, para 52.
[299] *Brandstetter v. Austria* (App. nos. 11170/84; 12876/87; 13468/87) ECtHR, 2 August 1991, para 67. See also *Vanjak v. Croatia* (n. 298) para 52. The HRC has made similar comments. See HRC, *General Comment No. 32* (n. 172) para 13; *Jansen-Gielen v. The Netherlands*, HRC (Com. no. 846/1999, 71st session, 3 April 2001) UN Doc. CCPR/C/71/D/846/1999, para 8.2; *Äärelä and Näkkäläjärvi v. Finland*, HRC (Com. no. 779/1997, 73rd session, 24 October 2001) UN Doc. CCPR/C/73/D/779/1997, para 7.4.
[300] *Rowe and Davis v. UK* (n. 230).

> means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party…In addition Article 6 § 1 requires, as indeed does English law…that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.[301]

Nevertheless, the Court then qualified this general requirement by stating that the entitlement to disclosure is not an absolute right. Rather, 'in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused'.[302] Going further, the Court noted that 'in some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest'.[303] However, the Court added the requirement that 'only such measures restricting the rights of the defence which are strictly necessary are permissible' under Article 6(1), and that 'in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities'.[304]

The United Nations (UN) Human Rights Committee (HRC) has reinforced some of these important principles in a General Comment.[305] For example, the HRC stated that the right to equality before courts and tribunals guaranteed the equality of arms and that the parties to proceedings are treated without any discrimination.[306] According to the Committee, this

[301] ibid, para 60. On these points, the Court drew attention to *Brandstetter v. Austria* (n. 299) paras 66-67; *Edwards v. UK* (App. no. 13071/87) ECtHR, 16 December 1992, para 36.
[302] ibid, para 61. See also *Doorson v. The Netherlands* (n. 229) para 70; *Kennedy v. UK* (n. 229) para 184.
[303] ibid.
[304] ibid. See also *Van Mechelen v. The Netherlands* (n. 242) paras 54 & 58; *Doorson v. The Netherlands* (n. 229) para 72; *Kennedy v. UK* (n. 229) para 184.
[305] HRC, *General Comment No. 32* (n. 172).
[306] ibid, para 13.

means that 'the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'.[307] Going further, the Committee noted that there would be no equality of arms if, for example, only the prosecutor was allowed to appeal a decision.[308]

2.5 Further Fair Trial Guarantees in Criminal Proceedings

In addition to the range of guarantees analysed above, an individual facing a criminal charge is entitled to the presumption of innocence,[309] and to an array of further minimum fair trial guarantees.[310] Taken collectively, these represent the maximum guarantees pertaining to the right to a fair trial under Article 6 of the ECHR and Article 14 of the ICCPR. In regards to the presumption of innocence and the additional guarantees under Articles 6(2) and 6(3) of the ECHR, the Court has maintained that these are aspects of the right to a fair trial as set out under Article 6(1) of the ECHR.[311] Accordingly, the Court examines any alleged violation of Articles 6(2) and (3) together with Article 6(1) of the ECHR.[312] This is an important consideration insofar as the overarching guarantee of 'fairness' in criminal trials under Article 6(1) of the ECHR also encapsulates the additional criminal trial guarantees under these provisions.

[307] ibid.
[308] ibid.
[309] Art. 6(2) ECHR; Art. 14(2) ICCPR.
[310] Art. 6(3) ECHR; Art. 14(3) ICCPR.
[311] On Art. 6(2) see *Allenet de Ribemont v. France* (App. no. 15175/89) ECtHR, 10 February 1995, para 35; *Deweer v. Belgium* (App. no. 6903/75) ECtHR, 27 February 1980, para 56. On Art. 6(3) see *T v. Austria* (App. no. 27783/95) ECtHR, 14 November 2000, para 70; *Kremzow v. Austria* (App. no. 12350/86) ECtHR, 21 September 1993, para 44.
[312] ibid. See also *Artico v. Italy* (App. no. 6694/74) ECtHR, 13 May 1980, para 32; *Goddi v. Italy* (App. no. 8966/80) ECtHR, 9 April 1984, para 28; *Colozza v. Italy* (n. 260) para 26.

2.5.1 The Right to be Presumed Innocent

The presumption of innocence is framed in almost identical terms in the ECHR and ICCPR.[313] The HRC has stressed the importance and the absolute nature of this guarantee, stating that 'deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times'.[314] In addition to the challenges the guarantee raise in ordinary criminal trials, the presumption of innocence is most vulnerable in trials concerning atrocities or other emotive crimes, not least of all where allegations of terrorism or other serious national security concerns arise.[315]

The presumption of innocence guarantees that the onus lies upon the prosecution to prove all the elements of the offence.[316] As such, the presumption of innocence will be violated where the burden of proof is shifted from the prosecution to the defence.[317] In common law countries, this is widely accepted as requiring that the State proves the guilt of the accused beyond all reasonable doubt.[318] The ECHR does not require this however, but rather, that guilt can only be found 'on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish…guilt'.[319]

The presumption of innocence finds its origins in a variety of historical sources, not least of all in the common law.[320] Perhaps the most famous judicial assertion of the principle was in

[313] Art. 6(2) ECHR; Art. 14(2) ICCPR. Note also Art. 48(1) of the EU Charter on Fundamental Rights.
[314] HRC, *General Comment No. 32* (n. 172) para 6.
[315] Robertson (n. 57).
[316] This includes 'negative' aspects such as the absence of consent in a rape allegation. See Clayton & Tomlinson (n. 163) 54.
[317] *Telfner v. Austria* (App. no. 33501/96) ECtHR, 20 March 2001, para 15; *John Murray v. UK* (App. no. 18731/91) ECtHR [GC], 8 February 1996, para 54.
[318] Although this standard is not codified in the ECHR or the ICCPR, the HRC has said that the principle *inter alia* 'imposes on the prosecution the burden of proving the charge' and 'guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'. See HRC, *General Comment No. 32* (n. 172) para 30. See also Art. 66(3) of the Rome Statute of the International Criminal Court (Rome, 17 July 1998; in force 1 July 2002, UN Doc. A/CONF.183/9) 2187 UNTS 90, which applies this principle to ICC proceedings.
[319] *Austria v. Italy* (App. no. 788/60) ECmHR, 23 October 1963, (1963) 6 YB 740, at 784.
[320] See P. Roberts, 'Taking the Burden of Proof Seriously' (1995) *Crim. LR* 783; A. Ashworth & M. Blake, 'The Presumption of Innocence in English Criminal Law' (1996) *Crim. LR* 306; K. Pennington, 'Innocent Until Proven Guilty: The Origins of a Legal Maxim' (2003) 63 *The Jurist* 106; A. Ashworth,

Woolmington v. DPP which concerned a murder trial and the trial judge's misdirection over the burden of proof.[321] Delivering the lead judgment in the House of Lords, Viscount Sankey LC held that it was a 'golden thread' running through the English criminal law that it was the 'duty of the prosecution to prove the prisoner's guilt'.[322] Furthermore, it was held that 'no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained'.[323] Additionally, in *Mancini v. DPP*, which concerned a murder trial and a plea of self-defence, Viscount Simon LC acknowledged *Woolmington v. DPP* and held that the prosecution must prove the charge beyond all reasonable doubt, adding that a prisoner should have the benefit should a reasonable doubt exist.[324] In a Privy Council case, *Haw Tua Tau v. Public Prosecutor*, in which a statutory provision allowed a court to draw inferences from a defendant's failure to give evidence, it was held that the right to be presumed innocent under Article 6(2) of the ECHR was an 'undoubted fundamental rule of natural justice'.[325]

In the particular context of terrorism trials, in *Heaney and McGuinness v. Ireland*, the two applicants were arrested on suspicion of terrorism offences and, despite being informed of their right to remain silent, were then questioned under compulsory powers.[326] The individuals claimed that the powers violated their rights to silence and against self-incrimination and that the presumption of innocence had been inverted. The ECtHR found that there had been a violation of Article 6(1) and Article 6(2) as the Irish government could not justify the action which challenged the right to silence and against self-incrimination.

'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241.

[321] *Woolmington v. DPP* [1935] AC 462.

[322] ibid, 481.

[323] ibid, 481-482.

[324] *Mancini v. DPP* [1942] AC 1, at 11.

[325] *Haw Tua Tau and others v. Public Prosecutor* [1982] AC 136 (Privy Council) 154.

[326] *Heaney and McGuinness v. Ireland* (App. no. 34720/97) ECtHR, 21 December 2000.

The ECtHR has also stressed the importance of the presumption of innocence, in regards to how the court must approach the proceedings and also in relation to the conduct of public officials. Regarding the conduct of judges, which is subjected to greater scrutiny,[327] the Court has stressed that:

> When carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.[328]

Insofar as the conduct of public officials is concerned, in *Allenet de Ribemont v. France* which concerned a murder trial, a senior Government Minister and two senior police officers made public pronouncements of guilt about the accused before charges had even been issued.[329] Crucially, the ECtHR held that 'the presumption of innocence may be infringed not only by a judge or court but also by other public authorities'.[330] The Court found that there was a violation of Article 6(2) as the statements by the officials 'encouraged the public to believe him guilty' and secondly, they had 'prejudged the assessment of the facts by the competent judicial authority'.[331]

In *Gridin v. Russia*, the HRC considered the conduct of the media, prosecutors and investigators in a rape and murder trial. The applicant alleged *inter alia* that the head of the police publicly stated he was sure the applicant was the murderer, which was broadcast on

[327] *Pandy v. Belgium* (App. no. 13583/02) ECtHR, 21 September 2006, para 43.
[328] *Barberà, Messegué and Jabardo v. Spain* (App. no. 10590/83) ECtHR, 6 December 1988, para 77. See also *Janosevic v. Sweden* (App. no. 34619/97) ECtHR, 23 July 2002, para 97; *Grande Stevens v. Italy* (App. no. 18640/10) ECtHR, 4 March 2014, para 159.
[329] In a press conference, the applicant was referred to as one of the instigators of the murder. *Allenet de Ribemont* v. *France* (n. 311) para 11.
[330] ibid, para 36. See also *Ismoilov and others v. Russia* (App. no. 2947/06) ECtHR, 24 April 2008, para 166; *Nestak v. Slovakia* (App. no. 65559/01) ECtHR, 27 February 2007, para 88.
[331] ibid, para 41. See also *Krause v. Switzerland* (App. no. 7986/77) ECmHR, 3 October 1978 which concerned a pending trial after an aircraft hijacking. The Federal Minister of Justice publicly declared that the applicant had committed certain offences, but then added that the applicant would face a trial. On this point, the ECmHR found that Art. 6(2) had not been violated as authorities are permitted to provide factual information to the public about criminal investigations.

television.[332] Furthermore, the applicant claimed that the investigator had pronounced his guilt in public meetings before the court hearing, and had called upon the public to send prosecutors to the trial.[333] The HRC stated that the Russian authorities had failed 'to exercise the restraint' required by Article 14(2) of the ICCPR and were thus found to have violated the individual's right to the presumption of innocence.[334]

The HRC have expanded upon the right in General Comment 32, although in an unfortunately short excerpt. In addition to the 'duty for all public authorities to refrain from prejudging the outcome of a trial', the HRC also stressed that 'defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they might be dangerous'.[335] More broadly on the role of the media when reporting terrorism trials, the HRC has suggested that 'the media should avoid news coverage undermining the presumption of innocence'.[336]

2.5.2 The Right to be Informed of the Accusation

The right of the accused to be informed of the nature and cause of the charges is codified in both the ECHR and ICCPR and carries many similarities with the guarantee of disclosure insofar as the equality of arms is concerned.[337] Additionally, the right carries many similarities with the right of an individual who has been arrested to be informed of the reasons for his arrest under Article 5(4) of the ECHR.[338] However, in a criminal trial, the obligation goes further, and must be assessed in light of the more general right to a fair hearing under Article 6(1) ECHR.[339] For example, in *Nielsen v. Denmark*, the ECmHR held that the information given to an individual in a criminal trial must be 'more specific and more

[332] *Dimitry L. Gridin v. Russian Federation*, HRC (Com. no. 770/1997, 69th session, 18 July 2000) UN Doc**.** CCPR/C/69/D/770/1997, para 3.5.
[333] ibid.
[334] ibid, para 8.3.
[335] HRC, *General Comment No. 32* (n. 172) para 30.
[336] ibid.
[337] Art. 6(3)(a) ECHR; Art. 14(3)(a) ICCPR. See also European Parliament and Council Directive on the Right to Information in Criminal Proceedings (n. 167).
[338] Art. 5(2) ECHR; Art. 9(2) ICCPR.
[339] *Deweer v. Belgium* (n. 311) para 56; *Artico v. Italy* (n. 312) para 32; *Goddi v. Italy* (n. 312) para 28; *Colozza v. Italy* (n. 260) para 26.

detailed' than that which must be given upon arrest.[340] In essence, the accused must be presented with enough detail of the allegations so as to put them in a position to be able to begin formulating a defence.

The ECtHR has deliberated on this fundamental issue on many occasions. For example, in *Péllisier and Sassi v. France*, which concerned the liquidation of a company and allegations of fraud, the Court held that 'the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair'.[341]

In *Mattoccia v. Italy*, which concerned the alleged rape of a mentally disabled child, the ECtHR criticised the Italian prosecutor's conduct in only providing vague details to the applicant before the trial commenced which were then contradicted during actual proceedings.[342] The Court noted that 'the accused must be made aware "promptly" and "in detail" of the cause of the accusation, that is, the material facts alleged against him which are at the basis of the accusation, and of the nature of the accusation, namely, the legal qualification of these material facts'.[343] The Court then added that the applicant must be 'provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence'.[344] The HRC has made similar remarks to this effect, stating that the 'right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law**,** or the individual is publicly named as such'.[345]

[340] *Nielsen v. Denmark* (App. no. 343/57) ECmHR, 2 September 1959, (1958-1959) 2 YB 412, at 462. See also *G, S and M v. Austria* (App. no. 9614/81) ECmHR, Admissibility Decision, 12 October 1983.
[341] *Péllisier and Sassi v. France* (App. no. 25444/94) ECtHR, 25 March 1999, para 52.
[342] *Mattoccia v. Italy* (App. no. 23969/94) ECtHR, 25 July 2000.
[343] ibid, para 59.
[344] ibid, paras 60-61.
[345] HRC, *General Comment No. 32* (n. 172) para 31. On this point the HRC cited *Rafael Marques de Morais v. Angola* (n. 244) para 5.4 and *Kelly v. Jamaica*, HRC (Com. no. 253/1987, 41st session, 10 April 1991) UN Doc. CCPR/C/41/D/253/1987, para 5.8.

2.5.3 The Right to be Present and to Legal Assistance

The rights of the accused to be present at trial, to defend oneself in person and to have legal assistance in criminal proceedings are framed in similar terms in both the ECHR and the ICCPR.[346] Although the specific articles also concern other fair trial guarantees, these are two of the most relevant for the purposes of counter-terrorist hybrid orders.

Firstly, there is a general common law rule that an accused must be allowed to be present in a criminal trial.[347] In *R v. Lee Kun*, a defendant who could not understand English was handed a death sentence after being convicted of murder.[348] During the trial, he was not provided with interpretation or a translation of any documents. Lord Reading CJ held that:

> [t]he reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings.[349]

Equally, it is generally the case that no part of a criminal trial should take place if the accused is absent.[350] For example, in *R v. Preston*, the defendants and their lawyers were excluded from court when the prosecution revealed that a telephone interception had taken place.[351] The House of Lords held it had not been necessary to exclude the defendants and solicitors from court as their presence would not have been detrimental to the public interest or the safety of informants.

The ECtHR has echoed these important principles. In *Ekbatani v. Sweden*, which concerned a dispute after the applicant failed a driving test, the Court noted that 'it flows from the notion

[346] Art. 6(3)(c) ECHR; Art. 14(3)(d) ICCPR.
[347] Clayton & Tomlinson (n. 163) 59.
[348] *R v. Lee Kun* [1916] KB 337.
[349] ibid, 341.
[350] Clayton & Tomlinson (n. 163) 59.
[351] *R v. Preston and others* [1994] 2 AC 130.

of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present at the trial hearing'.[352] Closely linked to the general right to be present is the right to take part and to participate in court. For example, in *Stanford v. UK* which concerned a raft of serious offences, the Court held that Article 6 'read as a whole, guarantees the right of an accused to participate effectively in a criminal trial' which generally includes *inter alia*, 'not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure'.[353]

However, as with many fair trial guarantees, the right to be present at trial and to defend oneself in person is not absolute. It is widely accepted that a defendant can be excluded if he is voluntarily absent, for instance due to a hunger strike,[354] or if a defendant is disruptive during the course of proceedings. Defendants may also be excluded from appeal proceedings concerning serious criminal conduct in certain circumstances, pursuant to the objectives of preventing crime or disorder, or protecting witnesses and victims.[355] The HRC has again made similar comments on this important principle, stating that proceedings in the absence of the accused 'may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present'.[356]

The possibility of holding criminal trials *in absentia* altogether is, however, more controversial. The ECtHR has accepted that criminal trials may be held *in absentia* if efforts have been made to inform the accused and the accused retains the right to re-trial.[357] Similarly, the HRC has noted that proceedings *in absentia* may be permissible if 'all due

[352] *Ekbatani v. Sweden* (App. no. 10563/83) ECtHR, 26 May 1988, para 25. See also *Colozza v. Italy* (n. 260) paras 27-29; *Monnell and Morris v. UK* (n. 261) para 58; *Sejdovic v. Italy* (App. no. 56581/00) ECtHR [GC], 1 March 2006, para 81.
[353] *Stanford v. UK* (App. no. 16757/90) ECtHR, 23 February 1994, para 26. See also *V. v. UK* (App. no. 24888/94) ECtHR [GC], 16 December 1999, para 85.
[354] See for example *Ensslin and others v. Germany* (App. nos. 7572/76; 7586/76; 7587/76) ECmHR, Admissibility Decision, 8 July 1978.
[355] *Marcello Violla v. Italy* (n. 242) paras 63-77.
[356] HRC, *General Comment No. 32* (n. 172) para 36.
[357] *Colozza v. Italy* (n. 260) paras 26-33; *Krombach v. France* (App no. 29731/96) ECtHR, 13 February 2001, paras 82-91.

steps have been taken to inform accused persons of the charges and to notify them of the proceedings'.[358]

Whereas the right to legal assistance in civil trials hinges upon the right of access to court being an effective right in practice,[359] the right is guaranteed in criminal cases and is codified in both the ICCPR and the ECHR. The provision of legal counsel is essential to ensure an individual can participate in a criminal trial. In this regard, the HRC has said that the provision or lack of legal assistance 'often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way'.[360] However, the right to legal assistance is a particularly problematic aspect of the right to a fair trial when matters of national security are concerned.[361] For example, the ECtHR has found that the right to legal advice can be restricted if there are compelling reasons to delay access, such as 'an urgent need to avert serious adverse consequences for life, liberty or physical integrity', which gives rise to a State's obligations under Articles 2, 3 and 5(1) of the ECHR.[362]

2.5.4 The Right to Examine Witnesses

The right to examine witnesses, which is codified in both the ECHR and ICCPR, further ensures that the accused can participate in a criminal trial in a meaningful way.[363] Although it is an essential element of the equality of arms, the right goes further in criminal trials. In the common law, it is clear that the right of the accused to see and to know the identity of his accusers should only be denied in rare or exceptional circumstances. For example, in *R v.*

[358] HRC, *General Comment No. 32* (n. 172) para 31.
[359] See *Golder v. UK* (n. 230) which concerned a failure to allow the applicant to contact his lawyer. See also *Airey v. Ireland* (App. no. 6289/73) ECtHR, 9 October 1979, which concerned the refusal to grant legal aid to a woman in divorce proceedings.
[360] HRC, *General Comment No. 32* (n. 172) para 10.
[361] See generally Dickson (n. 58).
[362] *Ibrahim v. UK* (n. 251) para 259.
[363] On this right the ECHR and ICCPR are framed in almost identical terms. See Art. 6(3)(d) ECHR; Art. 14(3)(e) ICCPR. See also HRC, *General Comment No. 32* (n. 172) para 39.

Taylor and Crabb, the Court of Appeal held that in a murder trial, a schoolgirl who was providing evidence could remain anonymous to the defendants.[364]

The ECtHR has found the right to a fair trial to have been violated in circumstances when the accused was not given an opportunity to examine witnesses. For example, in *Unterpertinger v. Austria*, which concerned domestic violence and allegations of assault, the applicant's conviction was 'mainly' based upon statements made to the police by the alleged victims which he could not challenge in trial.[365] Accordingly, the Court held that there had been a violation of Article 6, taken together with the principles contained within Article 6(3)(d) of the ECHR. In *Kostovski v. The Netherlands*, which concerned an armed robbery and the hearing of evidence from anonymous witnesses due to the fear of reprisals from organised criminal gangs, the Court held that there had been a violation of Article 6, taken together with Article 6(3)(d).[366] In *Lüdi v. Switzerland*, which concerned a drugs trafficking case and evidence adduced by an undercover agent which could not be challenged, the Court held that there had been a violation of Article 6(3)(d) in conjunction with Article 6(1).[367]

However, as is now a familiar trend, the ECtHR has made it clear that the right to examine witnesses is not absolute. For example, in *Engel v. The Netherlands*, the Court held that the right to examine witnesses 'does not require the attendance and examination of every witness on the accused's behalf'.[368] Rather, the steps taken by the court must ensure that the equality of arms is respected.[369]

The admissibility of 'hearsay' evidence has particularly exposed the differences between the common law and the jurisprudence of the ECtHR when it comes to evaluating the impact of restrictions of individual guarantees upon the more general right to a fair trial. In *R v.*

[364] *R v. Taylor and Crabb* [1995] Crim LR 253. See also *R v. Watford Magistrates Court, ex parte Lenman* [1993] Crim LR 388.
[365] *Unterpertinger v. Austria* (App. no. 9120/80) ECtHR, 24 November 1986, para 33.
[366] *Kostovski v. The Netherlands* (App. no. 11454/85) ECtHR, 20 November 1989.
[367] *Lüdi v. Switzerland* (App. no. 12433/86) ECtHR, 15 June 1992.
[368] *Engel v. The Netherlands* (n. 189) para 91.
[369] ibid. See also *Perna v. Italy* (App. no. 48898/99) ECtHR, 6 May 2003, para 29.

Horncastle,[370] the Supreme Court rejected the argument that English law on hearsay evidence violated Article 6 of the ECHR, which is much more restrictive vis-à-vis the admissibility of such evidence.[371] Subsequently, in *Al-Khawaja v. UK*, the ECtHR appeared to retreat from its previous decisions, backing the common law position by holding that convictions based solely or decisively on the evidence of absent witnesses whom the defendant could not examine or have examined, would not automatically violate Article 6.[372] However, the Court added that hearsay evidence may result in the rights of the defence being restricted to an extent that is incompatible with Article 6,[373] and that the question is whether there are 'sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability' of the evidence.[374]

The HRC has made similar comments on the right of the accused to examine witnesses, stating that the right to examine witnesses is 'an application of the principle of equality of arms' and that the guarantee 'is important for ensuring an effective defence by the accused and their counsel'.[375] However, the Committee then added that there is not 'an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings'.[376]

[370] *R v. Horncastle and others* (2009) UKSC 14. For commentary see Anthony, 'Article 6 ECHR, Civil Rights and the Enduring Role of the Common Law' (n. 111).
[371] See for example, *Doorson v. The Netherlands* (n. 229).
[372] *Al-Khawaja and Tahery v. UK* (App. nos. 26766/05; 22228/06) ECtHR [GC], 15 December 2011, para 147.
[373] Ibid, para 119. See also *Schatschaschwili v. Germany* (App. no. 9154/10) ECtHR [GC], 15 December 2015, paras 107 & 118; *Blokhin v. Russia* (App. no. 47152/06) ECtHR [GC], 23 March 2016, para 201.
[374] ibid. See also *Schatschaschwili v. Germany* (n. 373) para 116; *Blokhin v. Russia* (n. 373) para 202.
[375] HRC, *General Comment No. 32* (n. 172) para 39.
[376] ibid.

2.6 Fair Trial Guarantees in Civil Proceedings

Of the fair trial guarantees discussed in this chapter, only those provided under Article 6(1) of the ECHR and Article 14(1) of the ICCPR are also expressly guaranteed in proceedings concerning the determination of an individual's civil rights and obligations, which are in turn classified as civil proceedings.[377] Even so, as alluded to earlier,[378] States are granted greater flexibility when implementing fair trial guarantees in civil proceedings than they are with criminal proceedings.[379] Having said that, the ECtHR has on a number of occasions found that certain fair trial guarantees integral to criminal proceedings can also be applicable in civil proceedings.

Chief amongst these is the equality of arms. The ECtHR imported the requirement of the equality of arms into civil cases in *Dombo Beheer v. The Netherlands* which concerned a court's refusal to allow a former managing director of a company to give evidence whilst, at the same time, allowing the bank manager of the disputing party to give evidence.[380] The ECtHR held that 'for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to [civil]…cases as well as to criminal cases'.[381]

Nevertheless, it is clear that the principle is not necessarily applied as vigorously in civil trials as it is in criminal trials. In criminal trials, where the prosecution has all the machinery and

[377] Note also Article 47 of the EU Charter on Fundamental Rights, which, as noted earlier, is not limited to the determination of matters involving civil rights and obligations or a criminal charge.
[378] See above, section 2.2.
[379] *Dombo Beheer B.V. v. The Netherlands* (n. 173) para 32. See also *Jokela v. Finland* (n. 174) para 68; *Levages Prestations Services v. France* (n. 174) para 46; *Perić v. Croatia* (n. 174) para 18; *König v. Germany* (n. 173) para 96.
[380] *Dombo Beheer B.V. v. The Netherlands* (n. 173).
[381] ibid, para 33. See also *Feldbrugge v. The Netherlands* (App. no. 8562/79) ECtHR, 29 May 1986, para 44; HRC, *General Comment No. 32* (n. 172) in which the Committee stated that the equality of arms demands that 'each side be given the opportunity to contest all the arguments and evidence adduced by the other party'. (para 13).

resources of the State behind it, the principle of equality of arms is an essential guarantee in order for the accused to defend themselves.[382]

Equally, the right to an adversarial trial may be imported into civil proceedings and the requirements may in principle be the same as in criminal proceedings.[383] Moreover, the ECtHR has stressed that 'the right to a fair – adversarial – trial "means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party".'[384] However, it is clear that the right to an adversarial trial in civil proceedings is not absolute, but 'its scope may vary depending on the specific features of the case in question'.[385]

The presumption of innocence may also apply in civil proceedings in certain circumstances.[386] For example, the guarantee may be applied in professional disciplinary proceedings;[387] proceedings after an acquittal;[388] or a stay of proceedings where a criminal prosecution is time-barred but an accused is requested to pay costs.[389]

2.7 Derogations in Times of Emergency

In addition to the permissible limitations which are inherent in the right to a fair trial as defined under IHRL, States may also restrict certain fair trial guarantees in exceptional situations by derogating from some aspects of the right in order to respond to situations of national emergency. Under both the ECHR and the ICCPR, States are permitted to temporarily suspend certain aspects of their IHRL obligations in emergency situations which

[382] Amnesty International, 'Fair Trial Handbook' (n. 163) 119.
[383] *Werner v. Austria* (App. no. 21835/93) ECtHR, 2 November 1997, para 66.
[384] *McMichael v. UK* (App. no. 16424/90) ECtHR, 24 February 1995, para 80. See also *Ruiz-Mateos v. Spain* (App. no. 12952/87) ECtHR, 23 June 1993, para 63.
[385] *Hudáková and others v. Slovakia* (App. no. 23083/05) ECtHR, 27 April 2010, para 26. See also *Asnar v. France (no. 2)* (App. no. 12316/04) ECtHR, 18 October 2007, para 26; *Vokoun v. The Czech Republic* (App. no. 20728/05) ECtHR, 3 July 2008, para 26.
[386] Interights (n. 163) 57.
[387] *Agosi v. UK* (App. no. 9118/80) ECtHR, 24 October 1986.
[388] *Lutz v. Germany* (n. 199); *Allen v. UK* (App. no. 25424/09) ECtHR [GC], 12 July 2013.
[389] *Minelli v. Switzerland* (App. no. 8660/79) ECtHR, 25 March 1983.

threaten the life of the nation.[390] Due to the potential implications of a derogation, the practice has been described as 'perhaps the most far-reaching of the permissible techniques for unilateral modification of a State's human rights obligations'.[391]

The declaration of a public emergency in order to derogate from certain aspects of a State's obligations under IHRL is one of the most serious and radical decisions a State can make to legitimately react to a crisis. Primarily, 'the derogation articles [in the relevant IHRL treaty] embody an uneasy compromise between the protection of individual rights and the protection of national needs in times of crisis'.[392] Exploring this phenomenon is crucial not least for the reason that 'there is a frequent and perhaps understandable link between states of emergency and situations of grave violations of human rights'.[393] As such, it is vital to reflect upon what exactly a public emergency entails.

According to Richard Burchill, derogations may be viewed in two contrasting ways: 'The first view is that derogation provisions demonstrate the continued primacy of State sovereignty in international human rights law' as they 'allow for State interest to prevail over human interest'.[394] On the other hand, 'derogation provisions are necessary to ensure States sign up to the treaty regime as it is unlikely any State would accept restraints upon the ability to act in all circumstances'.[395] In this sense, Burchill emphasises that a particular legal path is laid out which both respects and limits sovereignty: it is better to commit to the rule of law by means of a lawful channel rather than to unilaterally and unconditionally suspend legal rights.[396] Going further, the power of a State to derogate from IHRL obligations can be so drastic that the HRC has stated that '[t]he restoration of a state of normalcy where full

[390] Art. 15 ECHR; Art. 4 ICCPR. See Chapter 1, section 1.4.1, text accompanying ns. 47-52.
[391] Scheinin & Vermeulen (n. 52) 43.
[392] Hartman (n. 61) 1.
[393] IComJ, *States of Emergency — Their Impact on Human Rights* (n. 49) i.
[394] Burchill (n. 61) 96.
[395] ibid.
[396] ibid. The legality argument is famously represented by Bruce Ackerman's suggestion that the USA should adopt an 'Emergency Constitution'. See B. Ackerman, 'The Emergency Constitution' (2004) *Faculty Scholarship Series*, Paper 121 at http://digitalcommons.law.yale.edu/fss_papers/121 and *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2007).

respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant'.[397]

The legal regimes governing derogations contain, expressly or impliedly, a number of conditions that must be satisfied in order for a derogation to be permissible under IHRL. These concern both procedural and substantive requirements, which have been approached and interpreted in different ways by scholars.[398] In essence, a State must notify the relevant authorities of its derogation, there must be a public emergency which threatens the life of the nation, the derogating measures must not go beyond the exigencies of the situation, and the measures must not conflict with a State's other international obligations.

As a useful point of introduction to what a state of emergency entails, the International Commission of Jurists (IComJ) has suggested that there are five international norms concerning states of emergency which can be deduced from the three primary IHRL instruments that provide the right for contracting Parties to derogate from their obligations:[399] (a) that the emergency 'threatens the life of the nation'; (b) that the measures taken 'be strictly required by the exigencies of the situation'; (c) that specified rights not be derogated from; (d) that derogations not be inconsistent with any other obligation under international law; and (e) that prompt reports regarding derogations are made.[400]

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[397] HRC, *General Comment No. 29: States of Emergency (Article 4)* (72nd session, 31 August 2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para 1.

[398] Oraá (n. 48); Conte & Burchill, *Defining Civil and Political Rights* (n. 52); Nicole Questiaux, 'Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency', UN Doc. E/CN.4/Sub.2/1982/15, 27 July 1982 (the 'Questiaux Report'). Oraá argued that for a derogation to be valid there are seven requirements which must be met: four procedural conditions (exceptional threat, proclamation, notification, and non-derogability of fundamental rights) and three substantive conditions (proportionality, non-discrimination, and consistency with other international obligations). Conte argued that for a derogation to be valid under the ICCPR there are six requirements: two procedural conditions (non-derogable rights and notification) and four substantive conditions (a public emergency, the exigencies of the situation, other international obligations and non-discrimination). Finally, the Questiaux Report suggested that for a derogation to be valid there are five requirements: one procedural condition (proclamation) and four substantive conditions (an exceptional threat, proportionality, non-discrimination, and inalienable fundamental rights).

[399] The ECHR, ICCPR and the American Convention on Human Rights (San José, 22 November 1969; in force 18 July 1978) 1144 UNTS 143.

[400] IComJ, *States of Emergency – Their Impact on Human Rights* (n. 49) 440.

Before analysing the requirements which a State must satisfy for a derogation to be lawful, it is important to bear in mind a number of issues. Firstly, certain rights under the ECHR and ICCPR can never be derogated from.[401] For example, common to both instruments, as a *jus cogens* norm, the prohibition of torture and, arguably, cruel, inhuman or degrading treatment is non-derogable.

Insofar as the right to a fair trial is concerned, the ECHR and ICCPR both forbid derogations from the prohibition of the application of *ex post facto law* or punishment in almost identical terms.[402] Otherwise, within the provisions of the ECHR and the ICCPR, there are no further guarantees that bind the UK pertaining to the right to a fair trial which are expressly non-derogable.[403] However, the HRC has emphasised that certain fair trial guarantees not expressly mentioned in the derogation provision of the ICCPR cannot be derogated from under any circumstances, including those that are 'explicitly guaranteed under international humanitarian law during armed conflict', such as the fundamental requirements of the right to a fair trial.[404] Specifically, the HRC has stated that 'only a court of law may try and convict a person for a criminal offence';[405] that the presumption of innocence must be respected;[406] and that the right to take proceedings before a court to enable the court to review the lawfulness of detention must not be diminished.[407] Additionally, the HRC has emphasised that the non-derogable prohibition of torture also includes the prohibition of the use of

[401] Art. 15(2) ECHR; Art. 4(2) ICCPR. See also HRC, *General Comment No. 29* (n. 397) para 7; Siracusa Principles (n. 231) paras 58-60; Section C of the Paris Minimum Standards of Human Rights Norms in a State of Emergency (the 'Paris Minimum Standards'). The Standards provide 16 non-derogable rights. See R. B. Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' 79 *Am. J. Int'l L.* 1072. For commentary, see S. R. Chowdhury, *Rule of Law in a State of Emergency. The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (Pinter Publishers, 1989).
[402] Art. 7 ECHR; Art. 15 ICCPR. See also Siracusa Principles (n. 231) para 58.
[403] Under Art. 4 of Additional Protocol No. 7 to the ECHR, the prohibition of the *non bis in idem* principle is also non-derogable. However, as noted earlier, the UK has not signed the Protocol.
[404] HRC, *General Comment No. 29* (n. 397) paras 11 & 16. See also Stavros, 'The Right to a Fair Trial in Emergency Situations' (n. 60).
[405] HRC, *General Comment No. 29* (n. 397) para 16.
[406] ibid. See also HRC, *General Comment No. 32* (n. 172) para 6.
[407] HRC, *General Comment No. 29* (n. 397) para 16.

evidence obtained by torture in trial;[408] and that the right to a competent, independent and impartial tribunal is also non-derogable.[409] Nevertheless, as discussed further below, even those rights which are in principle derogable cannot be derogated from in their entirety.

The measures taken by a State pursuant to a derogation must also not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[410] Although, in contrast to Article 4 of the ICCPR, Article 15 of the ECHR does not expressly state that derogations must not be discriminatory, the general prohibition of discrimination in the enjoyment of Convention rights is, of course, contained within Article 14 of the ECHR. Even so, the fact that a derogation under the ECHR must not be inconsistent with a Contracting State's other international obligations will include a State's obligations under the ICCPR, which expressly prohibits derogations which are discriminatory.

2.7.1 Notification of the Derogation

Once a State has opted to derogate from its IHRL obligations, it must inform the appropriate treaty institutions in accordance with the relevant treaty provisions.[411] As a minimum, a State Party derogating from the ECHR must keep the Secretary-General of the CoE fully informed of the measures which it has taken and the reasons for this, and it must inform the Secretary-General when the measures have ceased to operate.[412]

In the context of the ICCPR, the HRC has noted that a State Party resorting to a derogation 'must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures'.[413] This notification requirement 'is essential not only for the discharge of the Committee's

[408] HRC, *General Comment No. 32* (n. 172) para 6. See also *A and others v. SSHD (No. 2)* [2005] UKHL 71, [2006] 2 AC 221.
[409] HRC, *General Comment No. 32* (n. 172) para 19. See also *Gonzáles del Rio v. Peru*, HRC (Com. no. 263/1987, 46th session, 2 November 1992) UN Doc. CCPR/C/45/D/263/1987, para 5.1.
[410] Art. 4(1) ICCPR. See also HRC, *General Comment No. 29* (n. 397) para 8; Siracusa Principles (n. 231) para 9; Paris Minimum Standards (n. 401) Section B para 2(d).
[411] Art. 15(3) ECHR; Art. 4(3) ICCPR. See also Siracusa Principles (n. 231) paras 42-50; Paris Minimum Standards (n. 401) Section B para 2(a).
[412] *Lawless v. Ireland (No. 3)* (App. no. 332/57) ECtHR, 1 July 1961, The Law para 42.
[413] HRC, *General Comment No. 29* (n. 397) para 17.

functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant'.[414]

Accordingly, the notification of derogation must be as detailed as possible, in order to ensure transparency and allow other contracting States, as well as monitoring bodies, to assess the extent of the derogation measures, their necessity and proportionality.[415] Furthermore, a notice of derogation should include, as a minimum, 'full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law'.[416]

However, in 2015 and 2016, two States notified the CoE of their intention to derogate from their respective obligations under the ECHR, initially providing very limited information concerning the extent of their derogations. First, following the various terrorist attacks in France in 2015,[417] the French Government notified the Secretary General of the CoE of its intention to derogate from the ECHR pursuant to Article 15, merely stating that some of the measures taken by France under the state of emergency 'may involve a derogation from the obligations' under the ECHR.[418] Of the measures subsequently implemented, so-called

[414] ibid.
[415] Siracusa Principles (n. 231) para 45.
[416] HRC, *General Comment No. 29* (n. 397) para 17. The Siracusa Principles (n. 231) go further and state that a notification should contain *inter alia*: (a) the provisions of the Covenant from which it has derogated; (b) a copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency; (c) the date of the imposition of the state of emergency and the period for which it has been proclaimed; (d) an explanation of the reasons which actuated the decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and (e) a brief description of the anticipated effect of the derogation measures on the rights recognised by the Covenant. (para 45).
[417] In January 2015 17 civilians were killed in, and during the aftermath of, an attack against the Paris headquarters of the satirical magazine 'Charlie Hebdo'. On 13 November 2015, 130 civilians were killed in coordinated attacks in Paris. A state of emergency was declared by Presidential decree that evening, which was extended with parliamentary approval on 19 November 2015 and again on 16 February 2016. On 14 July 2016, 84 civilians were killed in an attack in Nice, following which, the state of emergency which was due to expire on 26 July 2016 was extended again until January 2017. In December 2016, this was again extended until July 2017. Upon assuming the Presidency in May 2017, Emmanuel Macron sought parliamentary approval to extend the emergency until November 2017.
[418] For the text of the derogation, see CoE, Reservations and Declarations for Treaty No. 005 - Convention for the Protection of Human Rights and Fundamental Freedoms: France at https://www.coe.int/en/web/conventions/full-list/-

'administrative searches' and 'Assigned Residence Orders' have attracted considerable scrutiny.[419] The state of emergency was eventually allowed to expire in November 2017,[420] after the French Parliament had enacted sweeping counter-terrorism laws which made many of the temporary measures permanent, subject to a pledge to review the powers after two years.[421] Elsewhere, following the attempted coup d'état in Turkey in July 2016, the Turkish Government notified the Secretary General of the CoE of its intention to derogate under Article 15, merely stating that some measures 'may involve derogation from the obligations' under the ECHR.[422]

Although neither State notified the Secretary General of the CoE which specific articles of the ECHR they would be derogating from, both States also notified the Secretary General of the UN of their intention to derogate from the ICCPR, but expressly identified which particular articles of the ICCPR they intended to derogate from.[423] Accordingly, it might be

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/conventions/treaty/005/declarations?p_auth=EfHYDVjq&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=FRA&_coeconventions_WAR_coeconventionsportlet_codeNature=10. For commentary see H. Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) PL 609; M. Milanovic, 'France Derogates from ECHR in the Wake of the Paris Attacks', *EJIL: Talk* (13 December 2015) at http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/; L. Tayler, 'France's Emergency Powers: The New Normal' *Just Security* (2 August 2016) at https://www.justsecurity.org/32236/frances-emergency-powers-normal/.

[419] Boutin (n. 90); Amnesty International, 'Upturned Lives: The Disproportionate Impact of France's State of Emergency' (Amnesty International Publications, 2016); Human Rights Watch, 'France: Abuses Under State of Emergency' (3 February 2016) at https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency.

[420] By a letter dated 12 July 2017, the Permanent Representative of France to the CoE noted: '[A]s the state of emergency cannot remain in force as long as a continuing terrorist threat, the state of emergency has been extended only until 1 November 2017, which will be used to complete the structure built in recent years and provide the State with new instruments to enhance the security of people and property outside the special framework of the state of emergency'. The cessation of the state of emergency was confirmed in a letter from the Representative dated 2 November 2017.

[421] For commentary see E. Asgeirsson, 'French Anti-Terror Bill Threatens to Extend State of Emergency Abuses' *Just Security* (2 August 2017) at https://www.justsecurity.org/43771/french-anti-terror-bill-threatens-normalize-state-emergency/; F. Ní Aoláin, 'France: The Dangers of Permanent Emergency Legislation' *Just Security* (27 September 2017) at https://www.justsecurity.org/45263/france-dangers-permanent-emergency-legislation/.

[422] For the full text of the derogation see CoE, Reservations and Declarations for Treaty No. 005 - Convention for the Protection of Human Rights and Fundamental Freedoms at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=7fdmASfW. See also M. Scheinin, 'Turkey's Derogation from the ECHR – What to Expect?', *EJIL: Talk* (27 July 2016) at http://www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/.

[423] For the text of the derogations, see United Nations Office of the High Commissioner for Human Rights, Ratification of 18 International Human Rights Treaties at http://indicators.ohchr.org/.

questioned whether either State fully complied with their obligations under the ECHR to notify the CoE of their intentions and, in particular, to explain how the measures taken will not go beyond the exigencies of the situation.

2.7.2 A Public Emergency which Threatens the Life of the Nation

The first substantive requirement in order for a derogation to be lawful is that there must be a 'public emergency' which threatens 'the life of the nation'.[424] The ECmHR and the ECtHR have commented on this requirement on numerous occasions, finding that a number of characteristics must be shown for an emergency to exist.[425]

The first characteristic for a state of emergency to exist is that the occasion must amount to an 'exceptional situation'. In *Lawless v. Ireland*, which was the first ever judgment issued by the ECtHR in 1961, the Court considered the legality of a derogation made by Ireland.[426] Lawless had been a member of the IRA who was arrested on a number of occasions and the Court had to consider whether his detention was justified in light of Ireland's derogation under Article 15 of the ECHR. The Court referred to the 'natural and customary meaning' of the words 'public emergency threatening the life of the nation', and stated that they 'refer to an exceptional situation of crisis or emergency'.[427]

In 1969, the ECmHR built upon the *Lawless* judgment in *The Greek Case* which still stands as one of the most important cases on the matter.[428] Four States filed applications to the

[424] Art. 15(1) ECHR; Art. 4(1) ICCPR. Art. 15(1) ECHR also expressly mentions 'war', although it is widely understood that 'public emergency' under Art. 4(1) ICCPR encapsulates situations of war. See also Siracusa Principles (n. 231) paras 39-41.
[425] See *Lawless v. Ireland* (n. 412); *Denmark v. Greece* (App. no. 3321/67); *Norway v. Greece* (App. no. 3322/67); *Sweden v. Greece* (App. no. 3323/67); *The Netherlands v. Greece* (App. no. 3344/67) (1969) 12 Yearbook ECHR 1 ('*The Greek Case*'); *Ireland v. UK* (n. 2); *Brogan and others v. UK* (App. nos. 11209/84; 11234/84; 11266/84; 11386/85) ECtHR, 29 November 1988; *Brannigan and McBride v. UK* (n. 7); *Aksoy v. Turkey* (App. no. 21987/93) ECtHR, 18 December 1996.
[426] *Lawless v Ireland* (n. 412). Lawless argued that his detention without trial for almost five months in a military detention camp had violated his rights under Articles 5, 6 and 7 of the ECHR.
[427] ibid, The Law para 28. See also Siracusa Principles (n. 231) para 39; Paris Minimum Standards (n. 401) Section A para 1(b).
[428] *The Greek Case* (n. 425). This case followed a coup d'état in 1967, in which Brigadier General Stylianos Pattakos and Colonels George Papadopoulos and Nikolaos Makarezos seized power in Greece and formed a military junta.

ECmHR in September 1967, alleging that the Greek military government which seized power in April 1967 had violated its obligations under the ECHR.[429] The ECmHR indicated that states of emergency may be seen to have, in particular, four characteristics, the first being that the emergency must be actual or imminent, and the fourth being that:

> The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[430]

The second characteristic of a state of emergency, as the ECtHR and ECmHR held in *Lawless* and *The Greek Case* respectively, is that the exceptional situation must affect the whole population, regarding either the entire nation, or the specific area to which the state of emergency applies.[431]

Finally, according to *Lawless* and *The Greek Case*, the third characteristic is that the exceptional situation, which affects the whole population, must constitute a threat to the organised life of the community.[432]

When determining whether a public emergency exists pursuant to these three characteristics, States are afforded a wide margin of appreciation which the Court has asserted on numerous occasions, beginning with the landmark *Ireland v. UK* ruling.[433] The Government of Ireland alleged that that the powers of extrajudicial deprivation of liberty applied in Northern Ireland between August 1971 and March 1975 contravened Article 15.[434] The Chamber had no difficulty in finding that 'the existence of such an emergency is

[429] The governments referred to *inter alia* the suspension of certain articles of the Greek Constitution, the prohibition of ordinary political activities, the establishment of extraordinary courts martial, the imprisonment of thousands for long periods, censorship, and the restriction of free expression and assembly.
[430] *The Greek Case* (n. 425) para 153.
[431] See *Lawless v Ireland* (n. 412), The Law para 28; and the second of four characteristics stated in *The Greek Case* (n. 425) para 153. See also Siracusa Principles (n. 231) para 39(a); Paris Minimum Standards (n. 401) Section A para 1(b).
[432] ibid, The Greek Case (n. 425) para 153. See also Siracusa Principles (n. 231) para 39(b); Paris Minimum Standards (n. 401) Section A para 1(b).
[433] *Ireland v. UK* (n. 2).
[434] ibid, para 202.

perfectly clear from the facts', citing the numerous deaths, injuries and property damage during the Troubles.[435] The Court held:

> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.[436]

The HRC have arguably been the most critical international institution in scrutinising the existence of emergency situations, in the form of its Concluding Observations of periodic reports submitted by contracting States under Article 40 of the ICCPR. Whilst the ECtHR offers a wide margin of appreciation to States in the determination of the existence of a state of emergency, the HRC has insisted that 'compliance with all aspects of article 4, including the determination of whether a state of emergency exists, is a matter in respect of which it has final say'.[437] For example, the HRC has criticised the prolonged states of emergency in existence in Syria;[438] Croatia;[439] the Netherlands Antilles,[440] Yemen;[441] and Algeria.[442]

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[435] ibid, para 205.
[436] ibid, para 207. This was the first time the ECtHR expressly relied upon the margin of appreciation doctrine. See also *Aksoy v. Turkey* (n. 425) para 68.
[437] Conte & Burchill, *Defining Civil and Political Rights* (n. 52) 45.
[438] HRC, *Concluding Observations on the Syrian Arab Republic* (71st session, 24 April 2001) UN Doc. CCPR/CO/71/SYR, paras 6-7; HRC, *Concluding Observations on the Syrian Arab Republic* (84th session, 9 August 2005) UN Doc. CCPR/CO/84/SYR, para 6.
[439] HRC, *Concluding Observations on Croatia* (71st session, 30 April 2001) UN Doc. CCPR/CO/71/HRV, para 9.
[440] HRC, *Concluding Observations on the Netherlands* (72nd session, 27 August 2001) UN Doc. CCPR/CO/72/NET, para 16.
[441] HRC, *Concluding Observations on Yemen* (75th session, 12 August 2002) UN Doc. CCPR/CO/75/YEM, para 14.

2.7.3 Strictly Required by the Exigencies of the Situation

The second substantive requirement for a derogation to be valid is that the measures taken must not go beyond the 'exigencies of the situation'.[443] Whereas the ECtHR has adopted, for the most part, a predominantly deferential approach to the question of whether a state of emergency exists, the Court has not shown the same level of deference to this second requirement.

For example, in *Ireland v. UK*, after granting a wide margin of appreciation to the UK in determining the emergency, the Court noted:

> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court…is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision.[444]

The most helpful commentary on what the limits of the exigencies may be comes from the HRC which stated that 'this requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency'.[445] In essence, when determining whether the measures taken are required by the exigencies of the situation, a State must be able to justify them with regard to the specific duration, geographical coverage and material scope of the emergency at issue.

Furthermore, the HRC has insisted that States have a legal obligation to 'narrow down all derogations to those strictly required by the exigencies of the situation [which] establishes both for States parties and for the Committee a duty to conduct a careful analysis under

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[442] HRC, *Concluding Observations on Algeria* (91st session, 12 December 2007) UN Doc. CCPR/C/DZA/CO/3, para 14.
[443] Art. 15(1) ECHR; Art. 4(1) ICCPR. See also Siracusa Principles (n. 231) paras 51-57; Paris Minimum Standards (n. 401) Section B para 2(b).
[444] *Ireland v. UK* (n. 2) para 207. See also *Aksoy v. Turkey* (n. 425) para 68; *Brannigan and McBride v. UK* (n. 7) para 42.
[445] HRC, *General Comment No. 29* (n. 397) para 4. See also Siracusa Principles (n. 231) para 51.

each article of the Covenant based on an objective assessment of the actual situation'.[446] Insofar as the geographical constraint of a derogation is concerned, it is apparent that a State cannot rely upon a derogation to take action in a region outside of the scope of the original derogation.[447] As such, the courts will assess the necessity and proportionality of the measures when assessing whether action taken is within the 'exigencies of the situation'.

2.7.4 Compatibility with the State's Other International Obligations

Finally, in order for a derogation to be lawful, the measures taken must not be inconsistent with a State's other international obligations.[448] This requirement is, on the one hand, the most straightforward requirement to comprehend, but on the other hand, perhaps the most far-reaching principle. Firstly, it is evident that in principle, no derogation could be made under the ECHR which is inconsistent with any other international treaty that a State has signed and ratified.[449]

As already mentioned, the HRC has drawn particular attention to the rules of IHL which any potential derogation cannot be inconsistent with,[450] whereas the Siracusa Principles stress the importance of the various Geneva and International Labour Organisation Conventions.[451] The particular emphasis placed upon the rules of IHL clearly reflects the fact that historically, many emergencies arise in times of armed conflict, thus triggering the application of IHL.

Having said that, in light of the recent episodes of terrorist violence in Europe and the persistent warnings of future attacks, it is arguable that the threat of armed conflict has been superseded by the threat of terrorism as the most obvious or foreseeable example of an emergency situation that States may face. As mentioned earlier, scholars have

[446] HRC, *General Comment No. 29* (n. 397) para 6.
[447] In *Sakik v. Turkey*, the ECtHR held that it 'would be working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation'. See *Sakik and others v. Turkey* (App. nos. 23878/94 to 23883/94) ECtHR, 26 November 1997, para 39.
[448] Art. 15(1) ECHR; Art. 4(1) ICCPR. See also HRC, *General Comment No. 29* (n. 397) para 9; Siracusa Principles (n. 231) para 14; Paris Minimum Standards (n. 401) Section B para 2(c).
[449] Lehmann (n. 61).
[450] See above, section 2.7; HRC, *General Comment No. 29* (n. 397) para 9.
[451] Siracusa Principles (n. 231) para 66.

overwhelmingly rejected the suggestion that the 'War on Terror', or counter-terrorist campaigns in general, can be considered an 'armed conflict' which would invoke the rules of IHL.[452] As such, it will be of greater concern for the courts and monitoring bodies to ensure that counter-terrorist measures taken by States pursuant to a derogation under the relevant IHRL treaty do not contradict their international obligations under other human rights treaties. For States that derogate from the ECHR, this will include the ICCPR, but issues may also arise in respect of a State's obligations under the Convention Against Torture.[453]

2.8. Conclusions

This chapter has sought to briefly outline the legal framework pertaining to the right to a fair trial in the context of national security. As the following chapter will demonstrate, a methodical assessment of the implications and compatibility of certain legal mechanisms with the right to a fair trial from the perspective of IHRL ultimately stems from the categorisation of proceedings concerning those mechanisms as criminal or civil. Whilst individuals in all proceedings in the UK are entitled to certain common law guarantees which are complemented by international human rights instruments, only those individuals facing criminal charges will be entitled to the additional guarantees inherent to criminal proceedings. Lastly, where a State is unable to exercise the inherent limitations of some fair trial guarantees, it may seek to derogate from certain fair trial guarantees.

[452] See Chapter 1, section 1.4.1, text accompanying ns. 43-45.
[453] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, GA Res. 39/46, 10 December 1984; in force 26 June 1987) 1465 UNTS 85.

Chapter 3. Counter-Terrorist Hybrid Orders

3.1 Introduction

Having discussed the scope of the right to a fair trial in the context of national security in Chapter 2, this chapter critically analyses one particular type of counter-terrorist response in the UK in light of the applicable legal framework. Specifically, this chapter focusses on the emergence of an array of executive orders which, for the purposes of this thesis, have been termed 'counter-terrorist hybrid orders'. These mechanisms consist of Control Orders (2005-2011), TPIMs (2011-) and TEOs (2015-). Whilst other counter-terrorist and non-terrorism-related executive powers share some similarities with these mechanisms, as the brief discussion of executive 'hybrid' powers in the Literature Review alluded to,[454] the justification for the focus of this thesis and collective analysis of these particular mechanisms is further demonstrated in this chapter.

Firstly, as this chapter demonstrates, these mechanisms share much in common in respect of their underlying rationale, legislative frameworks, legal issues that stem from their implementation and administration, and the consequences of the mechanisms for a number of human rights. One of the most significant issues that unites these particular mechanisms is that they are perceived as part of the solution to two enduring and overlapping challenges that subsequent UK Governments have had to grapple with in recent years, namely, how to deal with terrorist suspects who can be neither deported or prosecuted, nor indefinitely detained, but also, how to ensure procedural fairness in proceedings with national security concerns. In that respect, whilst Control Orders in the past and TPIMs as they currently operate allow for a broader range of restrictions to be imposed against individuals than TEOs can, the three mechanisms all raise particular challenges for the right to liberty under Article 5 and the right to a fair trial under Article 6 of the ECHR.

[454] See Chapter 1, section 1.4.3, text accompanying ns. 82-95.

Secondly, the three mechanisms explored in this thesis are strongly linked as they correspond to the changing nature of the perceived terrorist threat and policy objectives of subsequent Governments. Whilst Control Orders were introduced in the wake of the House of Lords decision in the Belmarsh case,[455] TPIMs were intended to serve as a more long-term and more liberal replacement for the Control Order regime. More recently, as the terrorist threat from non-UK citizens appears to have been superseded by the threat posed by British citizens or individuals with rights of permanent residence, the introduction of TEOs was deemed necessary to restrict the activities of suspected terrorists who travelled abroad in some similar ways to Control Orders and TPIMs.

Thirdly, whilst other counter-terrorist hybrid powers are significant and worthy of analysis, most notably asset-freezing powers under the Terrorist Asset-Freezing Etc. Act 2010 and the seizure of passports under Schedule 1 to the Counter-Terrorism and Security Act 2015, these mechanisms are much more narrow in scope and are designed to disrupt very particular activities of individuals. For example, the purpose of the asset-freezing regime is 'to freeze the assets of individuals and groups thought to be involved in terrorism, whether in the UK or abroad, and to deprive them of access to financial resources'.[456] It is also necessary to limit the scope of this thesis for practical reasons, and for the reasons discussed above these selected mechanisms share more in common and relate more to the aims and research questions of the thesis than other counter-terrorist powers have the potential to.

In essence, with each of the three mechanisms explored in this thesis, the Secretary of State for the Home Department (SSHD) can impose a broad variety of conditions upon an individual, both prohibiting conduct and imposing certain obligations. With Control Orders in the past, and now with TPIMs and TEOs, the mechanisms can be imposed upon individuals pursuant to the aim of protecting members of the public in the UK from a risk of terrorism,

[455] *A v. SSHD* (n. 33).
[456] D. Anderson, 'Fourth Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010' (March 2015) para. 1.1.

through a process in which the affected individual has very limited meaningful knowledge or participation. The measures envisaged under each of the mechanisms can be imposed with a very low threshold of proof or suspicion and are administered in the civil courts. Furthermore, any breach of the conditions attached to a mechanism can be met with criminal sanctions.

Although most public attention and analysis has focussed upon the impact of Control Orders, and by extension TPIMs, upon the right to liberty and security due to the possibility of 'house arrest' and the broad restrictions on an individual's freedom of movement, the 'more enduring and intricate controversy' has concerned their implications for the right to a fair trial.[457] Furthermore, the inherently international nature of the TEO mechanism has added an extra layer of complexity and more research is needed in respect of this particular counter-terrorist hybrid order. This chapter seeks to address these enduring controversies. From the perspective of the right to a fair trial, there are a number of overlapping concerns with counter-terrorist hybrid orders which necessitate further analysis.

Firstly, the often severe restrictions and obligations imposed upon individuals can significantly affect, restrict or possibly infringe a number of human rights, not least of all the prohibition of inhuman and degrading treatment;[458] the right to liberty and security;[459] and the four qualified rights pertaining to privacy and family life, beliefs and opinions, expression and assembly.[460] Questions arise as to whether the serious implications of the imposed mechanisms for these rights should necessitate stronger fair trial guarantees. Going further, the fact that criminal penalties can be imposed upon individuals for breaching the conditions raises serious concerns over fairness, especially when the sole purpose of the criminal courts is to consider whether a breach of the conditions attached to the mechanism has

[457] C. Walker, 'The Threat of Terrorism and the Fate of Control Orders' (2010) PL 4, at 5.
[458] Art. 3 ECHR; Art. 7 ICCPR. See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n. 453).
[459] Art. 5 ECHR; Arts. 9 & 10 ICCPR.
[460] Arts. 8-11 ECHR; Arts. 17-19; 21-22 ICCPR.

occurred or not, rather than to consider the implementation of the mechanism in the first place. As such, these concerns relate to the *substantive fairness* of the mechanisms.

Secondly, of greater concern for the purposes of this study are the circumstances in which counter-terrorist hybrid orders are implemented and administered by the courts, which significantly limit the role of the individual in proceedings. When the mechanisms are subjected to judicial oversight, they can be heard under CMP, a type of court procedure in which hearings can proceed both *in camera* and *ex parte*, and involve the appointment of a security-cleared lawyer known as a 'Special Advocate' to represent the interests of the individual. The characterisation of these proceedings as 'administrative' and therefore not criminal in nature, leading to the apparent circumventing of the additional guarantees which Article 6 ECHR requires for criminal trials,[461] is a serious cause for concern when ensuring the overall fairness of proceedings. As such, these issues relate to the *procedural fairness* of the mechanisms.

Following this Introduction, the second section discusses the origins of the three counter-terrorist hybrid orders that this thesis focusses on, analysing the most significant legal developments. The third section analyses the mechanisms in more depth, whilst also considering how Control Orders were replaced by TPIMs in 2011, which were in turn amended in 2015. As such, the third section outlines the statutory frameworks governing the three counter-terrorist hybrid orders, and in the process demonstrates the similarities of the mechanisms. The fourth section critically analyses the most significant aspects of the mechanisms which challenge the right to a fair trial. The fifth section then evaluates what steps have been taken in the attempt to improve the procedural fairness of the mechanisms before some brief conclusions are made in the sixth section.

[461] On which, see Chapter 2, section 2.5.

3.2 The Origins of Counter-Terrorist Hybrid Orders

3.2.1 The Deportation of Foreigners, Matters of National Security and the Introduction of CMP

As mentioned earlier, the UK has extensive experience responding to threats of domestic terrorist violence, and some of the most fundamental features of counter-terrorist hybrid orders can be traced back to the conflict in Northern Ireland.[462] Other features can be identified in more recent civil administrative measures, some of which do not concern terrorism or national security.[463] For the purposes of this study however, a number of legal developments shortly prior to and immediately after 9/11 paved the way for the introduction of counter-terrorist hybrid orders. Firstly, in 1997 the British Government introduced CMP in immigration proceedings which involved national security concerns, and since then the use of CMP has steadily spread to other proceedings which raise similar concerns. Secondly, in the aftermath of 9/11, the Government had to decide how it would treat suspected terrorists who could be neither prosecuted nor deported. The decision to indefinitely detain non-British suspected terrorists in 2001 and the court response that followed led to the creation of Control Orders in 2005. Where the two distinct phenomena converge, the foundations of the three counter-terrorist hybrid orders that this thesis focusses upon can be identified.

The reason for the introduction of CMP in the domestic legal system can be traced back to 1996 with the landmark *Chahal v. UK* judgment before the ECtHR.[464] Chahal was an Indian citizen and a Sikh separatist suspected of various terror offences. In 1990, having been informed of the Home Secretary's intention to deport him, Chahal applied for asylum in the UK, arguing that he would face persecution and torture in India. Although the case is most

[462] See Chapter 1, section 1.4.3, text accompanying ns. 74-79.
[463] In addition to the powers witnessed during the 'Troubles', the IRTL has drawn attention to other contemporary executive measures which place restrictions on individuals not convicted of any crime. These include asset-freezing, various immigration and nationality powers, ASBOs, football banning orders and serious crime prevention orders. See Anderson, 'Control Orders in 2011' (n. 6) paras 2.20-2.26.
[464] *Chahal v. UK* (n. 39). See C. J. Harvey, 'Expulsion, National Security and the European Convention' (1997) 22 *European Law Review* 626.

well-known for the issue of *non-refoulement* and Article 3 of the ECHR, it also raised issues under Article 5(4) of the Convention regarding an individual's right upon detention to access a court in order to determine the legality of their detention. More specifically, Chahal's Article 5(4) complaint concerned the Government's procedure for determining whether individuals posed a threat to national security in deportation cases.

Under the procedure in force at the relevant time, due to national security concerns, an internal Home Office advisory panel, composed of three members, heard the appeal against the decision of the Home Secretary.[465] An individual before the panel could make written and oral representations, call witnesses, and be assisted by a friend.[466] However, individuals were not entitled to legal representation and were only given an outline of the grounds for the notice of intention to deport.[467] Furthermore, the panel merely provided non-binding advice to the Home Secretary, which was not disclosed to the individual.[468]

The Grand Chamber of the ECtHR held that this system was incompatible with Chahal's right to have the lawfulness of his detention decided by a court under Article 5(4) of the ECHR.[469] Going further, the Court determined that, due to the shortcomings of the advisory panel and the lack of procedural guarantees that an individual enjoyed, the panel could not be considered a 'court' for the purposes of Article 5(4).[470]

Ironically, following the intervention of several NGOs, the Grand Chamber inadvertently advocated what would become the basis of much of the UK's approach to sensitive national security proceedings in the following years.[471] The Court first held that 'the use of confidential material may be unavoidable where national security is at stake' before adding

[465] *Chahal v. UK* (n. 39) para 60.
[466] ibid, paras 32 & 60.
[467] ibid, paras 130 & 154.
[468] ibid, paras 60, 130 & 154.
[469] ibid, paras 124-133.
[470] ibid, para 130.
[471] On the approach of the court on this point see D. Jenkins, 'There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology' (2011) 42 *Columbia Human Rights Law Review* 279. See also *Tinnelly and Sons Ltd and others and McElduff and others v. UK* (n. 232), in which the ECtHR made similar remarks concerning the possibility of appointing Special Advocates.

that ‘this does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved’.[472] The Court remarked that ‘in Canada a more effective form of judicial control has been developed in cases of this type’ which ‘illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice’.[473] The Court was specifically referring to the practice of appointing a ‘Special Advocate’ in certain immigration cases which raised national security concerns. The Grand Chamber expanded:

> [A] Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However…their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[474]

With these remarks, the ECtHR had essentially provided the solution to the problem the Court had itself pointed out to the British Government. Clearly, the UK wished to retain the possibility of deporting individuals who were seen as posing a threat to national security, but, at the same time, a transparent review procedure which entailed the complete disclosure of all evidence could undermine national security. As David Jenkins effectively summarised, the *Chahal* decision ‘raised two nagging questions that governments in Europe and

[472] *Chahal v. UK* (n. 39) para 131.
[473] ibid.
[474] ibid, para 144.

elsewhere have struggled with ever since'.[475] Firstly, States would need to decide how to deal with dangerous foreign nationals who could not be deported due to a risk of torture, and secondly, States that wished to be able to use and protect sensitive evidence in legal proceedings would clearly still need to ensure procedural fairness to the individuals.[476]

In response to the findings of the ECtHR, the British Parliament enacted the Special Immigration Appeals Commission (SIAC) Act 1997. The SIAC Act established the Special Immigration Appeals Commission which hears appeals relating to the Immigration Act 1971, or more broadly relating to deportation orders made in the interests of national security.[477]

Under the SIAC Act 1997, the Lord Chancellor is authorised to make rules applying to the proceedings before the Commission.[478] Specifically, section 5(3)(a) allows the proceedings to take place 'without the appellant being given full particulars of the reasons for the decision which is the subject of his appeal', and section 5(3)(b) allows proceedings to occur in the absence of the individual and his legal representative.[479] Of equal importance, section 6(1) allows for the appointment of a Special Advocate 'to represent the interests of an appellant' when the individual and his chosen lawyer are excluded from proceedings.[480] With these three core provisions, the British Parliament had clearly responded to the ECtHR's speculative remarks in *Chahal* regarding the Canadian approach to sensitive immigration proceedings.[481] Ultimately, these provisions would collectively form the foundations of what would later be labelled CMP: the 'Kafkaesque' situation in which the accused is not fully informed of the charges, is not allowed to participate in trial in any meaningful sense, and is

[475] Jenkins (n. 471) 284.
[476] ibid, 284-285.
[477] Special Immigration Appeals Commission Act 1997 (the 'SIAC Act'), s. 2. On the background and operation of SIAC, see Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (2004–05, HC 323).
[478] SIAC Act 1997, s. 5(3).
[479] See also SIAC (Procedure) Rules 2003, Rule 43.
[480] ibid, Rules 33-36.
[481] On the development of Special Advocates see Jenkins (n. 471); J. Ip, 'The Rise and Spread of the Special Advocate' (2008) PL 717; E. Metcalfe, '"Representative but not Responsible": The Use of Special Advocates in English Law' (2004) 1 *Justice Journal* 11.

not allowed any contact with his Special Advocate once the advocate has been served with the closed evidence.[482]

The Government's haste to implement these aspects of the Canadian model was not without criticism. For example, the Constitutional Affairs Select Committee observed in 2005 that, despite governmental claims that the procedure had been endorsed by the ECtHR in *Chahal*, the Court had not in fact 'given a ringing endorsement to the use of Special Advocates at all'.[483] Moreover, the Committee pointed to the ECtHR's decision in *Al Nashif* in 2002 which briefly considered the role of Special Advocates in the SIAC in the UK, where the Chamber held:

> Without expressing in the present context an opinion on the conformity of the above system with the Convention, the Court notes that, as in the case of *Chahal* cited above, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.[484]

Similarly, in *A v. UK* in 2009, the facts of which will be examined shortly, the Grand Chamber confirmed that the Court had never been required to decide whether or not the Special Advocate procedure was compatible with Article 5(4) or Article 6 of the ECHR.[485]

In this regard, David Jenkins has forcefully argued that the ECtHR's unintended encouragement of the Canadian model was a misguided demonstration of comparative law. This 'unintentionally provoked a "race-to-the-bottom" by the British and Canadian governments', as each government looked to the other for innovative ways to use sensitive evidence and restrict the procedural rights of suspected terrorists in non-criminal

[482] The JCHR described this practice 'as "Kafkaesque" or like the Star Chamber'. See JCHR, *Counter–Terrorism Policy and Human Rights: 28 Days, Intercept and Post–Charge Questioning* (2006-07, HL 157, HC 394) para 210.
[483] Constitutional Affairs Committee (n. 477) per the Attorney General in Q. 251, as referenced in para 49.
[484] *Al-Nashif v. Bulgaria* (App no. 50963/99) ECtHR, 20 September 2002, para 97.
[485] *A and others v. UK* (App. no. 3455/05) ECtHR [GC], 19 February 2009 ('*A v. UK*') para 209.

proceedings.[486] Going further, Jenkins argued that this downward spiral was an attempt to rights-proof the Special Advocate system, to find the 'due process baselines below which they could not go', and to stretch State power.[487]

Whilst the Special Advocate system and CMP more generally remains controversial in the UK as this chapter will explore, as well as in Canada,[488] the use of these proceedings has attracted much attention in other common law countries that share similar security concerns, not least of all Australia and New Zealand, which have implemented similar procedures particularly in immigration settings.[489] The use of Special Advocates has received some support in these countries,[490] as well as in Israel.[491] Closer to home, the rules of procedure of the European Court of Justice have been recently reformed to allow for *in camera* proceedings if requested by a party.[492] As such, the use of CMP and Special Advocates, or broadly similar mechanisms, clearly appeals to countries confronted with similar challenges i.e. how to deal with sensitive evidence whilst ensuring procedural fairness to the individual concerned.

Despite the establishment of this radical new system of appeal in the UK, the question of whether SIAC's procedures were compatible with the right to a fair trial did not initially face serious judicial scrutiny. This was due to the Convention's well-established principle that Article 6 of the ECHR is not applicable to matters concerning the entry and expulsion of

[486] Jenkins (n. 471) 281.
[487] ibid, 353.
[488] *Canada (Citizenship & Immigration) v. Harkat* [2014] SCC 37, [2014] 2 SCR 33; Department of Justice, *Special Advocates Program Evaluation: Final Report* (Ottawa, 2015).
[489] See generally n. 59 above. In Australia see in particular D. Jenkins, 'The Handling and Disclosure of Sensitive Intelligence' (n. 59). In New Zealand see in particular C. Forcese & L. Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates* (Canadian Centre for Intelligence and Security Studies, 2007); J. Ip, 'The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill' (2009) 2 *New Zealand Law Review* 207.
[490] In Australia, see Sir R. Gyles, *Control Order Safeguards Part 2* (Canberra, 2016) 9-11. In New Zealand, see New Zealand Law Commission, *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NLC R135, Wellington, 2015) chs 6-9.
[491] *Jaber Mamdouh v. Commander of IDF Forces in Judea and Samaria* HCJ 317/13, 27 January 2013.
[492] ECJ Rules of Procedure of the General Court 2015 (L 105/1, 23 April 2015) Art. 109.

foreign nationals, insofar as they are considered not to amount to the determination of an individual's civil rights and obligations or of a criminal charge.[493]

3.2.2 The Anti-Terrorism, Crime and Security Act 2001 and the Attempt to Introduce Indefinite Detention

The second distinctive aspect of counter-terrorist hybrid orders – the restrictions and obligations that can be imposed upon an individual suspected of being involved in terrorism – can be traced to the immediate reaction of the UK Government after 9/11. In response to the attacks, the Government fast-tracked the ATCS Bill through Parliament, allowing the House of Commons only 16 hours to debate its content.[494] Although the ATCS Act 2001 covers a broad range of issues such as freezing orders, race hate offences, and weapons of mass destruction, it most infamously provided for the possibility of indefinite detention of non-British terrorist suspects.[495] With Part 4 of the Act which concerned Immigration and Asylum, the UK had purportedly found the solution to the enduring problem of having to deal with non-British terrorist suspects who could not be deported due to the principle of *non-refoulement*, but who at the same time could not be prosecuted due to evidentiary concerns.

The most important provisions of the ATCS Act on this matter were contained in four sections. Section 21 of the Act allowed the SSHD to certify a suspected international terrorist if the Secretary reasonably believed the person's presence in the UK was a risk to national security, and reasonably suspected that the person was a terrorist. Section 22 dealt with deportation and clearly referred to the *Chahal* decision as a potential obstacle to the removal of individuals. However, the most controversial aspect of the Act was contained in section 23 which allowed the detention of foreign nationals who were suspected terrorists when their

[493] See for example *Maaouia v. France* (App. no. 39652/98) ECtHR, 5 October 2000; *Urrutikoetxea v. France* (App. no. 31113/96) ECmHR, 5 December 1996; *Bozano v. France* (App. no. 9990/82) ECmHR, 15 May 1984; *Uppal and Singh v. UK* (App. no. 8244/78) ECmHR, 2 May 1979.

[494] A. Tomkins, 'Legislating Against Terror: The Anti-terrorism, Crime and Security Act 2001' (2002) PL 205. See also House of Lords Select Committee on the Constitution, *Fast-Track Legislation* (n. 55) paras 77-80.

[495] See H. Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 MLR 724; Elliott, 'United Kingdom: The "War on Terror", U.K.-Style – The Detention and Deportation of Suspected Terrorists' (n. 46).

removal or departure from the UK was prevented by law or practical considerations. Finally, section 25 allowed individuals to appeal to the SIAC against their certification.

Due to the severity of the deprivation of liberty that non-British citizens would face, the UK formally derogated from its international obligations under Article 5 of the ECHR. This drew much attention as it made the UK the only Member State of the CoE to derogate from its IHRL obligations because of the threat of terrorism immediately after 9/11.[496] The Derogation Order was carefully formulated and clearly addressed the requirements for a derogation to be lawful.[497]

Following the enactment of the ATCS Act 2001, eight foreign nationals were immediately detained in December 2001, and a further eight were detained in the following months, resulting in a total of 16 foreign nationals who were detained under Part 4.[498] By the time the regime was eventually repealed in 2005, 17 foreign nationals had been certified as suspected international terrorists by the SSHD.[499]

[496] The Commissioner for Human Rights of the CoE stated that 'Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances'. See Office of the Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on certain aspects of the United Kingdom derogation from Article 5 par. 1 of the European Convention on Human Rights*, CommDH(2002)7 (28 August 2002). In *A v. UK*, the ECtHR held that it was 'striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al-Qaeda, although other States were also the subject of threats'. See *A v. UK* (n. 485) para 180.

[497] On the formal requirements of a notice of derogation under IHRL, see Chapter 2, section 2.7.1. In accordance with the UK's obligations under Article 15(3), the Human Rights Act 1998 (Designated Derogation) Order 2001 (S.I. 2001/3644) was presented to the Secretary General of the CoE on 11 November 2001. The derogation was withdrawn on 3 April 2005 by the Human Rights Act 1998 (Amendment) Order 2005 (S.I. 2005/1071). The UK also derogated from Article 9 of the ICCPR. In accordance with the UK's obligations under Article 4(3) of the ICCPR, the UK's notification of the derogation was presented to the Secretary-General of the UN on 18 December 2001, and was withdrawn on 15 March 2005. For analysis see T. R. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 MLR 655.

[498] D. Blunkett, SSHD, HC Deb 18 November 2003, vol 13, col 27WS. See also Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (18 December 2003, HC 100) para 183.

[499] ibid. The seventeenth individual was certified under the ATCS Act 2001 but detained under different powers.

Inevitably, a legal challenge to the regime reached the House of Lords in one of the most important cases in its history, in what is popularly called the 'Belmarsh' litigation.[500] In the appeal, none of the nine appellants who were certified under the ATCS Act 2001 had been subject of criminal charges. The case concerned the compatibility of section 23 of the Act with the right to liberty under Article 5 of the ECHR in conjunction with Article 14 prohibiting discrimination.[501]

In 2004, a rarely constituted nine-judge bench in the House of Lords held by a majority of 8:1 that the indefinite detention regime violated Article 5 in conjunction with Article 14 of the ECHR.[502] The Court issued a declaration of incompatibility under section 4 of the HRA 1998 in respect of section 23 of the ATCS Act 2001. The majority of the Court followed Lord Bingham's leading judgment and found that the practice was arbitrary and not proportionate as required by Article 15 of the ECHR, as the harsh measures could only be implemented against non-British citizens and there was no objective justification for such differential treatment. Moreover, in 2009, in what was ultimately an inconsequential judgment for the Belmarsh detainees as the legislation had since been repealed, the ECtHR affirmed the 2004 decision of the House of Lords.[503]

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[500] *A v. SSHD* (n. 33). Baroness Hale suggested it was the 'most important case to come before the House' since she was a member (para 219). An online toolkit, 'RightsInfo', ranks the case as number one in the '50 Human Rights Cases that Transformed Britain'. See http://rightsinfo.org/infographics/fifty-human-rights-cases/. In 2015, the Incorporated Council of Law Reporting listed the case as one of the 15 most important cases in its 150 year history. See ICLR, '150 Years of Case Law on Trial' (17 July 2015) at http://www.iclr.co.uk/150-years-case-law-trial/.

[501] The SIAC quashed the derogation order and issued a declaration of incompatibility under s. 4 of the HRA 1998 in respect of s. 23 of the ATCS Act 2001. See *A and others v. SSHD* [2002] HRLR 45, [2002] ACD 98. The Court of Appeal allowed the Home Secretary's appeal and overturned the SIAC decision. See *A and others v. SSHD* [2002] EWCA Civ 1502, [2004] QB 335. The crucial difference between the judgments concerned the issue of discrimination. The Court of Appeal held that there was an objective justification for the difference in treatment between nationals and non-nationals, per Lord Woolf CJ (paras 52 & 56) and Brooke LJ (para 132). It was held that the non-nationals who could not be deported were in a different situation to British nationals, as they had no right to remain in the UK. The only reason they could not be removed was due to the principle of *non-refoulement*.

[502] For commentary see the Special Issue on the Belmarsh case (2005) 68 MLR 654-680; D. Feldman, 'Proportionality and Discrimination in Anti-Terrorist Legislation' (2005) 64 *Cambridge Law Journal* 271; A. Tomkins, 'Readings of A v Secretary of State for the Home Department' (2005) PL 259; D. M. Dwyer, 'Rights Brought Home?' (2005) 121 LQR 359.

[503] *A v. UK* (n. 485).

For Lord Nicholls, the principal weakness in the government's position concerned the difference in treatment afforded to British and foreign citizens. In his judgment, Lord Nicholls held that 'indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law'.[504] Going further, Lord Nicholls held that this 'deprives the detained person of the protection a criminal trial is intended to afford', adding that 'wholly exceptional circumstances must exist before this extreme step can be justified'.[505]

For Lord Scott, the derogation was 'at the extreme end of the severity spectrum'.[506] In this regard, Lord Scott boldly stated that indefinite imprisonment 'on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated…with the United Kingdom'.[507]

The lone dissenting opinion came from Lord Walker who argued that Part 4 of the ATCS Act 2001 was only a small part of the counter-terrorist response, and that the indefinite regime was not offensively discriminatory because there were sound rational grounds for different treatment.[508] He also pointed to the fact that only 17 individuals had been certified under the regime which was relevant to the issue of proportionality.[509]

From the various opinions of the Law Lords, a number of recurring themes can be identified. In addition to the *ratio* of the case that the measures were arbitrary, disproportionate and discriminatory, there was a general consensus that the courts should pay a significant amount of deference to the executive regarding the declaration of an emergency.[510] For example, Lord Walker stressed that safeguarding national security, along with economic

[504] *A v. SSHD* (n. 33) para 74.
[505] ibid.
[506] ibid, para 155.
[507] ibid.
[508] ibid, para 215.
[509] ibid, para 218.
[510] For a more detailed discussion of this aspect, see Chapter 4, section 4.3.2.

policy and the allocation of resources, are the areas that the courts are most reluctant to intervene in.[511] Lord Walker added that the courts should defer to the executive on matters of security risk, but not on the practical effects of the matters in question.[512] Lord Rodger considered that as the principal ally of the USA, there was good reason for the Government to think the UK could be attacked.[513] Furthermore, Lord Rodger acknowledged that the courts simply do not have the same accessibility of intelligence and expertise that the Government can rely upon.[514] Although agreeing with the majority that the appeal should be allowed, Lord Hoffmann did so for very different reasons and in the process provided the most interesting judgment. Crucially, his was the sole opinion to reject that a state of emergency existed in the UK.[515] However, in line with the jurisprudence of the ECtHR,[516] the House of Lords stressed that it would be for the courts to decide if the measures taken went beyond 'the exigencies of the situation'.

Secondly, one frequent analogy pondered by the House of Lords was that indefinite detention under the ATCS Act amounted to a three-walled prison as the individuals could leave the UK if they chose to.[517] Lord Nicholls acknowledged that even though the detainees could leave prison immediately if they left the country which amounted to a prison of 'three walls', this freedom was 'more theoretical than real' as the detainees preferred to stay in prison than risk ill treatment abroad.[518] The analogy is a pertinent one insofar as counter-terrorist hybrid orders are concerned. As will be discussed in the following sections, what followed the indefinite detention regime would create somewhat of a paradox. On the one hand, counter-terrorist hybrid orders certainly amount to a less restrictive regime in the

[511] *A v. SSHD* (n. 33) para 192.
[512] ibid, para 196.
[513] ibid, para 166.
[514] ibid.
[515] David Bonner has suggested that Lord Hoffmann's judgment is reminiscent of Lord Atkin's dissent in *Liversidge v. Anderson* [1941] UKHL 1, [1942] AC 206 and Lord Shaw's dissent in *R v. Halliday, ex parte Zadig* [1916] 1 KB 738, [1917] AC 260. See Bonner, *Executive Measures, Terrorism and National Security* (n. 74) 295.
[516] *Ireland v. UK* (n. 2); *Aksoy v. Turkey* (n. 425).
[517] In this regard, two of those detained under Part 4 of the ATCS Act 2001 voluntarily left the UK. See D. Blunkett (n. 498); Privy Counsellor Review Committee (n. 498) para 183.
[518] *A v. SSHD* (n. 33) para 81.

sense that an individual is not imprisoned and retains a degree of personal liberty. However, on the other hand, counter-terrorist hybrid orders can in some ways still amount to 'three walls' if an individual is subjected to strict curfews and harsh restrictions over work, travel, finance and communication.

3.2.3 Overcoming the Impasse: The Introduction of Counter-Terrorist Hybrid Orders

When the House of Lords issued a declaration of incompatibility in respect of Part 4 of the ATCS Act 2001, an action rarely undertaken by British courts,[519] the Government was not legally compelled to repeal the legislation due to the important constitutional principle of parliamentary sovereignty. However, such declarations under the HRA 1998 do carry significant political force. Accordingly, the British Government was faced yet again with the problem of having to deal with non-British terrorist suspects who could be neither deported or prosecuted, nor no longer indefinitely detained under the ATCS Act 2001.

The immediate response in the UK in the form of the Control Order regime represented a significant shift in approach in how the UK Government was to respond to the terrorist threat posed by individuals who could be neither deported nor prosecuted. Moreover, the introduction of Control Orders was just one example of the increasing use of executive orders in post-9/11 British counter-terrorist policy.[520] However, the Control Order mechanism would bring its own unique features to the fore and present new challenges to the right to a fair trial. With the harsh conditions which were deliberately imposed outside of the criminal justice system, but with the possibility of criminal sanctions for any breach of them, post-9/11 counter-terrorism in the UK had clearly evolved.

[519] According to the JCHR in March 2015: 'Since the Human Rights Act came into force on 2 October 2000, UK courts have made 29 declarations of incompatibility, of which 20 have become final'. See JCHR, *Human Rights Judgments* (2014-15, HL 130, HC 1088) para 4.1.

[520] On the UK's counter-terrorist laws and policies more broadly see K. Syrett, 'The United Kingdom' in K. Roach (ed.), *Comparative Counter-Terrorism Law* (CUP, 2015). In particular, the use of proscription, or the 'blacklisting' of organisations, to freeze assets and to issue travel bans has also raised concerns over the right to a fair trial.

Nevertheless, the initial legal dilemma raised by the Belmarsh judgment has clearly endured beyond the life of the Control Order regime, as successive British Governments have had to tackle persistent national security concerns in circumstances when individuals suspected of involvement in terrorism cannot be prosecuted. However, the terrorist threat in the UK has also clearly evolved somewhat since the Belmarsh judgment in 2004, as the threat of 'homegrown' terrorism and radicalised British citizens returning from conflict in Syria and Iraq has arguably superseded the threat posed by non-British citizens. In that regard, TPIMs and TEOs both share several fundamental characteristics with the now obsolete Control Order regime. Each mechanism presents similarly serious challenges to the right to a fair trial. As the following sections will illustrate, these similarities vindicate their collective analysis in this study and the labelling of such mechanisms as counter-terrorist hybrid orders.

3.3 The Statutory Frameworks Governing Counter-Terrorist Hybrid Orders

3.3.1 Control Orders under the Prevention of Terrorism Act 2005

The British Government responded to the concerns of the House of Lords in the Belmarsh case and implemented the PTA 2005 which repealed the indefinite detention regime under the ATCS Act 2001.[521] Taking its place, the PTA 2005 allowed any individual, crucially including British citizens, to be served with a Control Order.[522] The Bill was fast-tracked

[521] PTA 2005, s. 16(2)(a).

[522] For a useful and authoritative account of the Control Order regime, see Anderson, 'Control Orders in 2011' (n. 6). See also the reports of the former IRTL, A. Carlile, 'First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (2 February 2006); 'Second Report' (19 February 2007); 'Third Report' (18 February 2008); 'Fourth Report' (3 February 2009); 'Fifth Report' (1 February 2010); and 'Sixth Report' (3 February 2011). For commentary, see E. Metcalfe, 'Protecting a Free Society? Control Orders and the Prevention of Terrorism Act 2005' (2005) 2 *Justice Journal* 8; D. Bonner, 'Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights' (2006) 12 *European Public Law* 45; C. Walker, 'Keeping Control of Terrorists without Losing Control of Constitutionalism' (2007) 59 *Stanford Law Review* 1395; A. Sandell, 'Liberty, Fairness and the UK Control Order Cases: Two Steps Forward, Two Steps Back' (2008) 1 EHRLR 120; E. Bates, 'Anti-Terrorism Control Orders: Liberty and Security in the Balance' (2009) 29 *Legal Studies* 99; A. Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Springer, 2010) ch 18 'Control Orders and Preventative Detention'; Donkin, *Preventing Terrorism and Controlling Risk* (n. 93).

through Parliament in just two weeks.[523] According to the PTA 2005, a Control Order was 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism'.[524]

In essence, a Control Order was a specifically tailored mechanism that restricted, or on occasions, deprived individuals of their liberty whilst also restricting their privacy and freedoms in several ways. A Control Order could impose restrictions and obligations upon an individual from a non-exhaustive 'menu' of available options. More precisely, a Control Order allowed for 16 specified measures to be imposed upon individuals, including, *inter alia*, restrictions and requirements concerning work;[525] communication;[526] residence;[527] travel;[528] and curfews.[529] Control Orders lasted for a maximum of 12 months but could be indefinitely renewed if it was deemed necessary to protect the public.[530]

The PTA 2005 also allowed for a 'derogating obligation' to be imposed upon an individual, defined as an obligation which was incompatible with the right to liberty under Article 5 of the ECHR.[531] In that regard, the PTA 2005 allowed for the imposition of a derogating Control Order, in which the obligations imposed were or included 'derogating obligations'.[532] Although the PTA 2005 allowed for both derogating and non-derogating Control Orders to be imposed, no derogating orders were ever made and as such, the sum of jurisprudence, and the majority of commentary and analysis has concerned non-derogating Control Orders.

To impose a non-derogating Control Order upon an individual, the SSHD had to have reasonable grounds for suspecting that the individual was or had been involved in terrorism-related activity, and that the imposition of the Control Order was necessary to protect the

[523] House of Lords Select Committee on the Constitution, *Fast-Track Legislation* (n. 55) paras 81-82.
[524] PTA 2005, s. 1(1).
[525] s. 1(4)(c).
[526] ss. 1(4)(d) and (n).
[527] ss. 1(4)(e) and (f).
[528] ss. 1(4)(g),(h) and (i).
[529] s. 1(4)(p).
[530] s. 2(4)(a); s. 2(6).
[531] s. 1(10)(a).
[532] s. 4(1)(a).

public from terrorism.[533] Furthermore, the SSHD could only impose a non-derogating Control Order if approval had been granted by the High Court, or the urgency of the case required the Control Order without prior court approval, or the individual was certified as a suspected international terrorist under the ATCS Act 2001.[534] The court's role was then at various stages to subject the SSHD's decisions to the test of whether they were 'obviously flawed'.[535]

When the court considered the SSHD's application, it could be heard under CMP which entailed the hearing being held in the absence of the individual, without any notice of the application being provided, and without the opportunity for the individual to provide any representations to the court.[536] Furthermore, an individual faced with the imposition of a Control Order could have a lawyer appointed to represent their interests, known as a Special Advocate, although no contact was allowed between the two once the sensitive evidence had been presented to the Special Advocate, unless the court granted permission.[537] Finally, when issuing a judgment, a court could withhold any of its reasons if disclosure would conflict with the public interest.[538]

With a derogating Control Order, the court's role was much more pivotal. In order to impose a derogating Control Order, the SSHD had to apply to the High Court which had to hold an 'immediate preliminary hearing to determine whether to make a control order imposing obligations that are or include derogating obligations'.[539] If the court determined that a derogating Control Order could be imposed against an individual, it then had to 'give directions for the holding of a full hearing to determine whether to confirm the order (with or without modifications)'.[540] The preliminary hearing for a derogating control order could be held in the absence of the individual, without any notice of the application being provided,

[533] ss. 2(1)(a)-(b). On the notion of 'terrorism-related activity', see further at Chapter 4, section 4.3.1.
[534] ss. 3(1)(a)-(c). Upon the enactment of the PTA 2005, the 10 Belmarsh detainees who had been certified under the ATCS Act 2001 were released and immediately served with a Control Order.
[535] s. 3(2)(a), s. 3(3), s. 3(6)(a) and s. 3(6)(b).
[536] ss. 3(5)(a)-(c); Rule 76.22 of the Civil Procedure Rules (CPR).
[537] Schedule to the PTA 2005, para 7 and Rules 76.23-76.25 of the CPR.
[538] Rule 76.32 of the CPR. In these circumstances, the court had to deliver a separate closed judgment to the SSHD and the individual's Special Advocate.
[539] PTA 2005, s. 4(1)(a).
[540] s. 4(1)(b).

and without the opportunity for the individual to provide any representations to the court.[541] At the preliminary hearing, the court could make a derogating Control Order if it appeared that (a) there was material capable of being relied on by the court as establishing the individual was or had been involved in terrorism-related activity; (b) there were reasonable grounds for believing that imposing obligations was necessary to protect the public from terrorism; (c) the risk was associated with a public emergency which involved a derogation; and (d) the obligations imposed include derogating obligations which were of the description set out in the designation order.[542] At the full hearing, the court could confirm the derogating Control Order if it was satisfied on the balance of probabilities, that the individual was or had been involved in terrorism; that the obligations were necessary to protect the public; that the risk was associated with a public emergency which had been responded to with a derogation; and that the obligations to be imposed by the Control Order included derogating obligations described in the derogation order.[543]

Under the PTA 2005, an individual was guilty of an offence if they *inter alia* breached a condition attached to a Control Order unless they had a 'reasonable excuse'.[544] The individual faced a maximum of five years' imprisonment or a fine, or both.[545] In that regard, the then IRTL, David Anderson, noted that over the lifetime of the PTA 2005, 14 individuals were prosecuted for breaching their obligations.[546] However, Anderson noted that the outcome of the prosecutions was 'not encouraging' for the Government, as there were only two convictions which resulted in prison sentences of 20 weeks and 15 months, whilst in six cases no evidence was offered as it was considered no longer in the public interest to

[541] ss. 4(2)(a)-(c).
[542] ss. 4(3)(a)-(d).
[543] ss. 4(7)(a)-(d).
[544] ss. 9(1)-(3).
[545] s. 9(4)(a).
[546] Anderson, 'Control Orders in 2011' (n. 6) para 3.61.

continue the trial.[547] Furthermore, two individuals were acquitted, one person absconded before trial, one left the UK voluntarily, and three still awaited trial.[548]

Over the course of the life of the PTA 2005, 52 Control Orders were imposed upon individuals and all were made against men suspected of involvement in Islamist terrorism.[549] Each Control Order lasted from a few months to more than four-and-a-half years.[550]

3.3.2 TPIMs under the Terrorism Prevention and Investigation Measures Act 2011 as amended by the Counter-Terrorism and Security Act 2015

In May 2010, the Conservative Party and the Liberal Democrats formed a new Coalition Government, following which, the then Home Secretary, Theresa May, launched a review of counter-terrorism and security powers.[551] In January 2011, the Findings and Conclusions of the Review were published in which a number of recommendations were made concerning the Control Order regime. The Review concluded that:

> [t]he current control order regime can and should be repealed. The Government will move to a system which will protect the public but will be less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system. There will be an end to the use of forced relocation and lengthy curfews that prevent individuals leading a normal daily life. Under control orders the Government could implement any measure deemed necessary provided it

[547] ibid, para 3.62.
[548] ibid.
[549] ibid, para 1.1.
[550] ibid, para 1.2.
[551] Home Office, Rapid review of counter-terrorism powers, Press Release (13 July 2010) at https://www.gov.uk/government/news/rapid-review-of-counter-terrorism-powers. This followed commitments by the Conservative Party and the Liberal Democrats to review counter-terrorism laws. See Conservative Party, *A Resilient Nation: National Security Green Paper*, Policy Green Paper No. 13 (London, 2010) 23. The Liberal Democrats pledged to scrap Control Orders altogether. See Liberal Democrat Party, *Manifesto 2010* (London, 2010) 94.

> was not struck down by a court. Under this regime, the Government will specify in greater detail the measures that will and will not be available.[552]

As a result, and in light of the desire for more permanent legislation, the TPIM Act 2011 was enacted but without the same haste as its predecessor. Rather, it was enacted over a period of almost five months, receiving Royal Assent on 14 December 2011. The TPIM Act repealed the PTA 2005 and replaced the Control Order regime with TPIMs,[553] which are defined as 'requirements, restrictions and other provision which may be made in relation to an individual'.[554]

As it originally read before certain important amendments were made under the CTS Act 2015, section 3 of the TPIM Act listed five conditions that the SSHD had to meet in order to be able to impose a TPIM upon an individual. The SSHD had to reasonably believe that the individual is or has been involved in terrorism-related activity;[555] conclude that some or all of the terrorism-related activity must be new;[556] reasonably consider that the TPIM was necessary to protect the public;[557] reasonably consider that the TPIM was necessary to prevent or restrict the individual's involvement in terrorism-related activity;[558] and finally have the permission of the High Court or reasonably consider that the urgency of the case requires the TPIM to be imposed without prior permission.[559] The court's role is then to subject the SSHD's decisions to the test of whether they were 'obviously flawed'.[560]

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[552] Home Office, *Review of Counter-Terrorism and Security Powers* (Cmd 8004, 2011) Recommendations, para 23.
[553] TPIM Act 2011, s. 1. For a useful and authoritative account of the TPIM regime, see the Reports of the IRTL: D. Anderson, 'Terrorism Prevention and Investigation Measures in 2012: First Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011' (March 2013); 'Terrorism Prevention and Investigation Measures in 2013' (March 2014); 'Terrorism Prevention and Investigation Measures in 2014' (March 2015). See also A. Horne, 'The End of Control Orders' (2011) 175 *Criminal Law and Justice Weekly* 101.
[554] s. 2(2).
[555] s. 3(1). See further at Chapter 4, section 4.3.1.
[556] s. 3(2).
[557] s. 3(3).
[558] s. 3(4).
[559] s. 3(5).
[560] s. 6(3)(a).

Similar to a Control Order, when the court considers the Home Secretary's application to impose a TPIM, it can be heard under CMP which involves the proceedings being held in the absence of the individual, without any notice of the application being provided, and without the opportunity for the individual to provide any representations to the court.[561] Furthermore, an individual facing the imposition of a TPIM can have a Special Advocate appointed to represent their interests, although like the Control Order regime, no communication is allowed between the TPIM subject and the Special Advocate once the latter has been served with the closed material, unless the court grants permission.[562] Finally, when issuing a judgment, a court can withhold any of its reasons if disclosure would conflict with the public interest.[563]

Despite the numerous similarities, there are a number of important differences between the TPIM regime when it was first introduced and the Control Order regime.[564] Immediately, it is important to note the difference in the standards that the SSHD had to meet to impose a TPIM, as it originally stood, compared to its predecessor. As mentioned earlier, Control Orders could be imposed upon an individual on the basis of 'reasonable suspicion'. Initially, TPIMs could only be imposed by the SSHD on the basis of the higher threshold of 'reasonable belief'.[565]

A further significant difference between Control Orders and TPIMs is that, whereas Control Orders could be repeated on a yearly basis, TPIMs last for a maximum of two years unless

[561] ss. 6(4)(a)-(c); Rule 80.18 of the CPR.
[562] Schedule 4 to the TPIM Act 2011, para 10; Rules 80.19-80.21 of the CPR.
[563] Rule 80.28 of the CPR. In these circumstances, the court must deliver a separate closed judgment to the SSHD and the individual's Special Advocate.
[564] See H. Fenwick, 'Preventive Anti-Terrorist Strategies in the UK and ECHR: Control Orders, TPIMs and the Role of Technology' (2011) 25 *International Review of Law and Economics* 129; C. Walker & A. Horne, 'The Terrorism Prevention and Measures Act 2011: One Thing but Not Much the Other?' (2012) 6 *Crim. LR* 421; B. Middleton, 'Terrorism Prevention and Investigation Measures: Constitutional Evolution, not Revolution?' (2013) 77 *J. Crim. L.* 562.
[565] An explanation of the difference between 'belief' and 'suspicion' was offered in the Court of Appeal during the *A v. SSHD (No. 2)* litigation, concerning the use of evidence obtained by torture. Laws LJ held: 'Belief is a state of mind by which the person in question thinks that X is the case. Suspicion is a state of mind by which the person in question thinks that X may be the case'. See *A and others v. SSHD (No. 2)* [2004] EWCA Civ 1123, [2004] HRLR 38, para 229.

new terrorist activity can be identified.[566] Furthermore, every TPIM notice is automatically subject to a review hearing in which the court reviews the decisions of the SSHD that the relevant conditions were met and continue to be met.[567]

Going further, unlike the Control Order regime, Schedule 4 to the TPIM Act expressly provides that nothing in the rules of court relating to TPIM proceedings or appeal proceedings, including rules of disclosure, 'is be read as requiring the relevant court to act in a manner that is inconsistent' with Article 6 of the ECHR.[568] Thus, when TPIMs are implemented or reviewed, the courts may be particularly mindful of this provision and the need to intervene, if necessary, to ensure procedural fairness and that the requirements of Article 6 are met.

Finally, during the period that a TPIM is in force, the SSHD is obliged to keep under review whether conditions C and D are met; that is, that the Secretary reasonably considers the TPIM is necessary to protect the public and that the TPIM is necessary to prevent or restrict the individual's involvement in terrorism-related activity.[569]

Under the original statutory regime, an individual was guilty of an offence if they breached a condition attached to a TPIM unless there was a 'reasonable excuse' or the SSHD had given permission.[570] The individual could face a maximum of five years imprisonment or a fine, or both.[571] In that regard, the IRTL has noted the various examples of individuals who have faced criminal prosecution following a breach, or breaches, of the conditions imposed upon them under a TPIM. At the most extreme, one individual, 'DD', was charged and prosecuted

[566] TPIM Act 2011, s. 5.
[567] s. 9.
[568] Schedule 4 to the TPIM Act 2011, para 5.
[569] TPIM Act 2011, s. 11.
[570] ss. 23(1)-(2).
[571] s. 23(3)(a).

on a number of occasions for breaching several restrictions, resulting in separate prison sentences of 9 months and 15 months.[572]

However, in comparison to its predecessor regime, TPIMs have been imposed relatively sparingly thus far, and by 2014 it seemed that the mechanism was 'withering on the vine as a counter-terrorism tool of practical utility'.[573] This was because, as the Independent Reviewer attested in March 2015, only one TPIM remained in force and no new TPIMs had been implemented.[574] Further still, as of March 2015, before the regime was amended, only 10 TPIMs had been issued since the introduction of the mechanism.[575]

However, with the wide-ranging and comprehensive CTS Act 2015, the TPIM regime was seemingly revived when the TPIM Act 2011 was amended in light of the numerous recommendations made by the IRTL.[576] Under the CTS Act 2015, the power to relocate individuals which had been extremely controversial under Control Orders was reintroduced, albeit in a slightly less onerous form.[577] The CTS Act 2015 also amended the conditions which the SSHD must meet in order to impose a TPIM. The Home Secretary is now required to be satisfied on the higher standard of 'the balance of probabilities' that the individual is, or has been, involved in terrorism-related activity, which has in turn been reduced in scope.[578] Additionally, two important changes were made regarding the implications for any breach of

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[572] Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) para 2.8. DD was charged in April 2013 and sentenced to 9 months imprisonment for breaching the terms of his TPIM relating to restrictions on the use of electronic equipment and on association. In April 2014, DD pleaded guilty and was sentenced to 15 months imprisonment for an unauthorised meeting and use of a computer.

[573] JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) para 80.

[574] Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) para 1.10.

[575] ibid, para 2.3.

[576] For example, Anderson suggested that the 'very broad definition of terrorism-related activity' in s. 4 of the TPIM Act 2011 'should be revisited'; that 'the possibility of requiring the Home Secretary to satisfy a court that a TPIM subject has been involved in terrorism (rather than, as now, that her own belief in that involvement is reasonable) should also be considered'; and that 'if operational requirements so dictate, restoring the power to effect involuntary relocation'. See Anderson, 'Terrorism Prevention and Investigation Measures in 2013' (n. 553) 57.

[577] CTS Act 2015, s. 16. The individual and their family can be relocated up to 200 miles from their current location, and only further than 200 miles if the individual owns premises and agrees to relocate there. See D. Anderson, 'Relocation Relocation Relocation' (25 November 2014) at https://terrorismlegislationreviewer.independent.gov.uk/relocation-relocation-relocation/.

[578] See, respectively, ss. 20(1)-(2). See further at Chapter 4, section 4.3.1.

a condition. Firstly, the 'reasonable excuse' defence was removed from the crime of leaving the UK whilst subject to a TPIM, therefore introducing an obvious element of strict liability.[579] Secondly, the maximum custodial sentence for contravening travel measures was raised from five to 10 years.[580]

Insofar as the raising of the standard of proof is concerned, the IRTL was quick to point out that the increase in the threshold only applied to the Home Secretary's decision to impose a TPIM and not to the courts which would continue to apply the lighter judicial-review standard.[581] The Joint Committee on Human Rights (JCHR) voiced similar concerns shortly before the enactment of the CTS Act 2015. The JCHR welcomed the move to raise the threshold but noted that for the change to make a 'real practical difference', the TPIM Act should be 'amended to require the court also to consider whether the balance of probabilities standard was satisfied, in place of the current, lighter-touch judicial review standard'.[582]

Following the enactment of the CTS Act 2015, the number of TPIMs in force initially fluctuated between one and three.[583] When only one TPIM was in force as of 31 May 2016,[584] the Government faced much criticism for the lack of use of the mechanisms given the recent surge in terrorist attacks in France and Germany. For example, Lord Carlile, the former IRTL, stated that it was 'surprising and worrying' that just one TPIM was in force given the situation in Europe.[585] However, the use of TPIMs increased somewhat over the Summer of 2016 and six were in force as of 31 August 2016, five of which were against

[579] s. 17(3).
[580] s. 17(4).
[581] Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) para 3.8(b).
[582] JCHR, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (2014-15, HL 86, HC 859) para 4.14.
[583] The amount of TPIMs in force increased from one on 1 March 2015 to two on 31 May 2015. See T. May, SSHD, HC Deb 11 June 2015, vol 596, col 40WS. This increased to three as of 31 August 2015. See T. May, SSHD, HC Deb 17 September 2015, vol 599, col 45WS. The amount decreased back to two as of 30 November 2015 which remained the case as of 29 February 2016. See T. May, SSHD, HC Deb 10 December 2015, vol 603, col 61WS. The figure remained the same as of 29 February 2016. See T. May, SSHD, HC Deb 10 March 2016, vol 607, col 24WS.
[584] J. Hayes, Minister for Security, HC Deb 14 July 2016, vol 613, col 15WS.
[585] The Telegraph, 'Only One TPIM Terror Control Order is in place in Britain amid "Severe" Threat Level' (28 July 2016).

British citizens.[586] The number of TPIMs in force then rose slightly to seven,[587] which remained the case for several months before decreasing again to six as of 31 May 2017, which remained the case at the time of writing.[588]

Finally, in the major counter-terrorism and security powers Review in July 2010, it was also concluded that 'there may be exceptional circumstances' where additional restrictive measures could be necessary, such as a very serious terrorist risk which could not be managed by other means.[589] Moreover, the Review stated that draft legislation regarding these additional measures would be discussed with the Opposition and brought forward if and when necessary.[590] Accordingly, the Enhanced Terrorism Prevention and Investigation Measures (ETPIM) Bill was published on 1 September 2011 and included a much wider range of measures in comparison to the ordinary TPIM framework.[591] However, no further action has been taken and as such, the sum of jurisprudence, and most analysis has focussed upon the ordinary TPIM framework, although ETPIMs have received some attention.[592]

[586] A. Rudd, SSHD, HC Deb 26 October 2016, vol 616, col 13WS. See also SSHD, *Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011* (Cm 9348, October 2016) para 37.

[587] As of 30 November 2016, there were seven TPIMs in force, six of which were against British citizens. See A. Rudd, SSHD, HC Deb 15 December 2016, vol 618, col 63WS. This was confirmed in February 2017. See HM Government, Transparency Report 2017: Disruptive and Investigatory Powers (Cm 9420, February 2017) 21-22.

[588] As of 28 February 2017, there were seven TPIMs in force, six of which were against British citizens. See A. Rudd, SSHD, HC Deb 19 July 2017, vol 627, col 54WS. As of 31 May 2017, there were six TPIMs in force, five of which were against British citizens. See A. Rudd, SSHD, HC Deb 20 July, vol 627, col 67WS. Finally, as of 31 August 2017, there were six TPIMs in force, five of which were against British citizens. See A. Rudd, SSHD, HC Deb 16 October 2017, vol 629, col 39WS.

[589] Home Office, *Review of Counter-Terrorism and Security Powers* (n. 552) Recommendations, para 27.

[590] ibid, para 28.

[591] Draft Enhanced Terrorism Prevention and Investigation Measures Bill (Cmd 8166, 2011). The Draft Bill proposed that the SSHD would need to meet a higher threshold before imposing an ETPIM ('balance of probabilities') which could impose more onerous conditions than a regular TPIM. See Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (2012-13, HL 70, HC 495).

[592] On ETPIMs, see H. Fenwick, 'Redefining the Role of TPIMs in Combatting "Home Grown" Terrorism Within the Widening Counter-Terror Framework' (2015) 1 EHRLR 41; C. Walker, 'Legal Perspectives on Contingencies and Resilience in an Environment of Constitutionalism – An Overview' (2014) 18 *International Journal of Human Rights* 119.

3.3.3 TEOs under the Counter-Terrorism and Security Act 2015

With the ongoing Syrian Civil War (2011-) and the surge of the Islamic State in the Levant (ISIL) throughout the region, concerns began to mount in 2013 that individuals were leaving their countries of origin to engage in hostilities in Iraq and Syria.[593] The UN Security Council was so alarmed by the prospect of citizens travelling to these countries that in 2014 it called upon States to 'prevent and suppress the recruiting, organizing, transporting or equipping of individuals' who travel abroad to take part in terrorist acts or acquire terrorist training amongst other things.[594] In the UK, there was increasing concern that many of these individuals were attempting to return to the country having been radicalised and trained to commit terrorist atrocities.[595] As such, the Coalition Government determined that new measures were needed for managing the return of these so-called 'Foreign Terrorist Fighters'.[596]

Towards the end of the Coalition Government (2010-2015), the CTS Act 2015 was enacted after being semi fast-tracked through Parliament.[597] Chapter 2 of Part 1 concerns 'Temporary Exclusion' from the UK and states:

> A 'temporary exclusion order' is an order which requires an individual not to return to the United Kingdom unless –

[593] The International Centre for the Study of Radicalisation and Political Violence (ICSR) analyses this issue. See for example A. Y. Zelin, 'ICSR Insight: Up to 11,000 foreign fighters in Syria; steep rise among Western Europeans' (17 December 2013) at http://icsr.info/2013/12/icsr-insight-11000-foreign-fighters-syria-steep-rise-among-western-europeans/.
[594] UN Security Council Resolution 2178 (2014) para 5.
[595] The Home Secretary said during the second reading of the Counter-Terrorism and Security Bill that the UK faced 'the very serious prospect that British nationals who have fought with terrorist groups in Syria and Iraq will seek to radicalise others, or carry out attacks here'. See T. May, SSHD, HC Deb 2 December 2014, vol 589, col 207. See generally E. Bakker, C. Paulussen & E. Entenmann, 'Returning Jihadist Foreign Fighters' (2014) 25 *Security and Human Rights* 11; C. Lister, 'Returning Foreign Fighters: Criminalization or Reintegration?' (Brooking Doha Center, August 2015).
[596] D. Cameron, Prime Minister, HC Deb 1 September 2014, vol 585, cols 23-27. For analysis of this terminology, see C. Walker & J. Blackbourn, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 MLR 840; C. Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Laws' in D. Anderson, 'The Terrorism Acts in 2015: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (December 2016).
[597] House of Lords Select Committee on the Constitution, *Counter-Terrorism and Security Bill* (2014-15, HL 92) paras 1-3.

(a) The return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or

(b) The return is the result of the individual's deportation to the United Kingdom.[598]

The process by which the SSHD can impose a TEO is extremely similar to that of a TPIM. The Home Secretary must reasonably suspect the individual is, or has been, involved in terrorism-related activity outside of the UK;[599] reasonably consider that it is necessary to protect the public in the UK to impose a TEO;[600] reasonably consider the individual is outside of the UK;[601] be satisfied that the individual has the right of abode in the UK;[602] and have the permission of the High Court or reasonably consider the urgency of the case requires a TEO to be imposed without court authorisation.[603] Only if and when an individual is served with a TEO must the Secretary inform that individual,[604] at which point the TEO comes into force.[605] Similar to the TPIM mechanism, a TEO has a maximum duration of two years unless revoked by the SSHD.[606] However, further TEOs can be imposed upon the same individual without any new evidence being produced.[607] In order to give effect to the temporary ban on an individual's return to the UK, when the TEO comes into force, the individual's passport is invalidated.[608]

The TEO regime is, however, not merely concerned with the exclusion of individuals from the UK. Rather, sections 5 to 9 of the CTS Act 2015 deal with the management of their

[598] CTS Act 2015, s. 2(1). For commentary on TEOs see H. Fenwick, 'Terrorism Threats and Temporary Exclusion Orders: Counter-Terror Rhetoric or Reality?' (2017) 3 EHRLR 247; H. Fenwick, 'Probing Theresa May's Response to the Recent Terror Attacks' (2017) 4 EHRLR 341; H. Fenwick, 'Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counter-Terrorism and Security Act 2015' (2016) *International Review of Law, Computers and Technology* 1.
[599] CTS Act 2015, s. 2(3). See further at Chapter 4, section 4.3.1.
[600] s. 2(4).
[601] s. 2(5).
[602] s. 2(6). See Immigration Act 1971, s. 2.
[603] s. 2(7). See also Schedule 2 to the CTS Act 2015.
[604] s. 4(1).
[605] s. 4(3)(a).
[606] s. 4(3)(b).
[607] s. 4(8).
[608] s. 4(9).

return to the UK. In accordance with a 'Permit to return', certain obligations may be imposed as a precondition before allowing an individual to return. According to the Act:

> (1) A 'permit to return' is a document giving an individual (who is subject to a temporary exclusion order) permission to return to the United Kingdom.
>
> (2) The permission may be made subject to a requirement that the individual comply with conditions specified in the permit to return.
>
> (3) The individual's failure to comply with a specified condition has the effect of invalidating the permit to return.[609]

Furthermore, the permit to return must specify the time, manner and place of return,[610] which may include a specific route, mode of transport, carrier or service.[611] The SSHD must issue a permit to return if either the individual applies (and attends an interview with a constable or immigration officer if requested) or if the individual is to be deported to the UK.[612]

Once the individual has returned to the UK, the Home Secretary may impose a number of conditions upon the individual. These are limited to three types of obligations, two of which are adopted directly from the TPIM regime. Firstly, an individual may be obliged to report to a police station,[613] and secondly, to attend appointments which, according to the Act's explanatory notes, may include de-radicalisation programmes.[614] The third type of obligation that may be imposed upon an individual is that they must notify the police of their place of residence and any changes to their place of residence.[615] The SSHD can vary or revoke any

[609] ss. 5(1)-5(3).
[610] s. 5(4).
[611] ss. 5(5)-5(6).
[612] ss. 6-7.
[613] s. 9(2)(a)(i).
[614] s. 9(2)(a)(ii).
[615] s. 9(2)(b).

of the obligations.[616] Insofar as the courts are concerned, their function is to 'determine whether the relevant decisions of the Secretary of State are obviously flawed'.[617]

When receiving the application from the SSHD, the court may consider it in the absence of the individual, without the individual having been informed of the application, and without the individual having been given an opportunity to address the court.[618] Finally, when a TEO is reviewed in the courts, a Special Advocate will represent the individual's interests, although like Control Orders and TPIMs, no communication is allowed between the TEO subject and the Special Advocate once the latter has been served with the closed evidence, unless the court grants permission.[619] Finally, when issuing a judgment, a court can withhold any of its reasons if disclosure would conflict with the public interest.[620]

Individuals subjected to TEOs may commit an offence and be subjected to criminal sanctions in two ways. First, an individual 'is guilty of an offence if, without reasonable excuse, the individual returns to the United Kingdom in contravention of the restriction on return specified in the order'.[621] Second, 'an individual subject to an obligation imposed under section 9 is guilty of an offence if, without reasonable excuse, the individual does not comply with the obligation'.[622] With this latter offence, it is easy to draw parallels with the former Control Order regime and the TPIM mechanism which similarly provides for criminal punishment for contravening an imposed condition. Imitating both the Control Order and TPIM statutory regimes, an individual who breaches any condition attached to a TEO can face a maximum of five years' imprisonment or a fine, or both.[623]

Although the CTS Act entered into force in 2015, a freedom of information request submitted to the Home Office in February 2016 for the purposes of this research revealed that no

[616] s. 9(4).
[617] s. 3(2).
[618] s. 3(3); Rule 88.21 of the CPR.
[619] Schedule 3 to the CTS Act 2015, para 10(1); Rules 88.22-88.24 of the CPR.
[620] Rule 88.31 of the CPR. In these circumstances, the court must deliver a separate closed judgment to the SSHD and the individual's Special Advocate
[621] CTS Act 2015, s. 10(1).
[622] s. 10(3).
[623] s. 10(5)(a).

TEOs had been issued by April 2016.[624] Documents published in December 2016,[625] and again in February 2017,[626] confirmed that the situation had not changed as of November 2016. However, speaking shortly after the Manchester Arena terrorist bombing in May 2017, the Home Secretary Amber Rudd revealed that the power had been used for the first and only time.[627]

3.4 Counter-Terrorist Hybrid Orders and the Right to a Fair Trial

3.4.1 The Question of the Nature of Proceedings Relating to Counter-Terrorist Hybrid Orders

As already discussed, determining the nature of any proceedings is fundamental when ascertaining what fair trial guarantees are to apply in those particular proceedings.[628] If proceedings involve the determination of a criminal charge, the more stringent fair trial guarantees under the criminal limb of the right to a fair trial will apply, whereas if proceedings involve the determination of an individual's civil rights and obligations, the less stringent fair trial guarantees under the civil limb of the right to a fair trial will apply.[629] In the discussion that follows, it is important to bear in mind the relevant ECtHR jurisprudence which, as analysed earlier, indicates that the European Court will consider the domestic classification of the offence, the nature of the offence, and the degree of severity of the penalty.[630]

Foreshadowing the analysis that follows, the UK domestic courts have generally struggled with the issue of procedural fairness and the appropriate standard of proof in proceedings

[624] The request was rejected under section 22 of the Freedom of Information Act 2000 on the basis that the information was intended for future publication.
[625] C. Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Laws' (n. 596) para 20(d).
[626] HM Government, Transparency Report 2017: Disruptive and Investigatory Powers (Cm 9420, February 2017) 25.
[627] P. Walker, 'Rudd Admits Anti-Terror Exclusion Powers Used Only Once Since 2015', *The Guardian* (29 May 2017).
[628] See Chapter 2, section 2.2.
[629] Art. 6(1) ECHR; Art. 14(1) ICCPR.
[630] See in particular, *Engel v. The Netherlands* (n. 189) para 82.

concerning preventive civil measures. In the Belmarsh litigation, the SIAC rejected the argument that Article 6 applied at all to the certification process under the ATCS Act 2001, as the process was deemed not to be a criminal charge nor concerned with a civil right.[631] However, in the Court of Appeal, Lord Woolf CJ held that the appeal proceedings against the certification process were civil in nature.[632] Ultimately, the House of Lords did not address the issue or even consider the applicability of Article 6, but rather, decided the case solely on the bases of Articles 5 and 14 of the ECHR.[633] However, when tackling the same issue in a non-terrorist context, namely, in relation to ASBOs, the courts have been much more mindful of the serious criminal implications the individual might face should they breach the restrictions imposed under an ASBO. For example, in *R (McCann) v. Manchester Crown Court*, the House of Lords held that the criminal burden of proof should apply when implementing an ASBO due to the seriousness of the matters, despite simultaneously concluding that the proceedings were civil in nature.[634]

Inevitably, the same fundamental issue attracted a great deal of attention during the earliest years of the Control Order regime. The PTA 2005 faced no shortage of criticism throughout the course of its existence over the severity of possible measures and the circumstances in which they could be imposed. Insofar as the judicial oversight of Control Orders was concerned, the JCHR expressed doubts as to whether the mechanism was compatible with Article 6(1) ECHR.[635] More specifically, the JCHR suggested that, for derogating Control Orders, the criminal limb of Article 6(1) should apply.[636] However, the JCHR acknowledged that 'a more difficult question arises about the standards of due process applicable in relation

[631] *A v. SSHD* [2002] HRLR 45, [2002] ACD 98.
[632] *A v. SSHD* [2002] EWCA Civ 1502, [2004] QB 335, para 57.
[633] *A v. SSHD* (n. 33).
[634] *R (McCann) v. Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787, per Lord Steyn (para 37) and Lord Hope (para 82). Under the Crime and Disorder Act 1998, s. 1, there is no indication as to the applicable standard of proof when implementing an ASBO.
[635] JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006* (2005-06, HL 122, HC 915).
[636] ibid, para 49.

to non-derogating control orders'.[637] In a passage directly addressing the first *Engel* criteria, namely, the domestic classification, the JCHR noted:

> Formally speaking, control order proceedings are not classified in domestic law as 'criminal proceedings'. On the contrary, they are deliberately designed to appear to be civil orders which are intended to be alternatives to criminal prosecution in cases where prosecution is said not to be possible because the information which is the basis of the case against the individual cannot be used as 'evidence' in a criminal trial.[638]

The JCHR also considered the second and third *Engel* criteria, namely, the nature of the offence and the nature and severity of the penalty, and suggested that the majority of the earliest non-derogating Control Orders did actually amount to the determination of a criminal charge against the individual for three reasons.[639] Firstly, the alleged conduct forming the basis for a non-derogating Control Order i.e. involvement in terrorism-related activity, was not only conduct of a criminal nature but of a particularly serious criminal nature. Secondly, in the view of the JCHR, the restrictions and obligations placed upon an individual were of a nature and severity equivalent to a criminal penalty. Finally, the possible duration of the conditions under a Control Order made them tantamount to a criminal sanction, as they were potentially indefinite. On these points, the JCHR appeared to be repeating many of the concerns that the Commissioner for Human Rights of the CoE had expressed in 2004.[640] The Commissioner questioned whether the severity of Control Orders would be equivalent to a criminal penalty, due to the fact that Control Orders would be made in respect of activity

[637] ibid, para 50.
[638] ibid.
[639] ibid, para 51.
[640] Office of the Commissioner for Human Rights, *Report by A. Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom, 4th – 12th November 2004, for the attention of the Committee of Ministers and the Parliamentary Assembly*, CommDH(2005)6 (8 June 2005) paras 9-25.

which was essentially of a criminal nature, and also in respect of the severity of the restrictions imposed.[641]

A further area of concern over the Control Order mechanism related to the standard of proof that had to be met for the attached measures to be imposed. As the JCHR acknowledged, the 'reasonable suspicion' standard reflected the ease with which the SSHD could impose a Control Order, which also affected the adequacy and effectiveness of subsequent judicial oversight to safeguard against arbitrary or unjustified interference with human rights.[642] It is an obvious but necessary point that 'reasonable suspicion' falls someway short of the criminal burden of proof ('beyond all reasonable doubt'), the civil burden of proof ('balance of probabilities'), or even that of 'reasonable belief'. In the JCHR's view, reasonable suspicion was 'too low a threshold to justify the potentially drastic interference with Convention rights which such orders contemplate'.[643]

Particularly in the earliest days of the PTA 2005 before the regime came to be challenged in the House of Lords, criticism came from a variety of sources. For example, Lord Carlile produced the first report which reviewed the PTA 2005 in February 2006.[644] In reference to an Annex which outlined the proforma of the schedule of obligations imposed upon most of the Control Order subjects at that time, the former IRTL admitted that the obligations were extremely restrictive, and that although they had not been found to trigger a derogation, the 'cusp was narrow'.[645] Additionally, the Independent Reviewer concluded that the obligations fell 'not very short of house arrest, and certainly inhibit normal life considerably'.[646] In light of the Reviewer's comments and the proforma, the JCHR went even further and concluded that in their view, the obligations were so restrictive so as to amount to a deprivation of liberty.[647]

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[641] ibid, para 20.
[642] JCHR, *Counter-Terrorism Policy and Human Rights* (n. 635) para 56.
[643] ibid, para 63. The JCHR also voiced concern that the executive rather than the judiciary would be the initiators of the measures (paras 67-68).
[644] A. Carlile, 'First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (2 February 2006).
[645] ibid, para 42.
[646] ibid, para 43.
[647] JCHR, *Counter-Terrorism Policy and Human Rights* (n. 635) para 38.

The JCHR concluded that the PTA 2005 made it likely that the power to impose non-derogating Control Orders would be exercised in a way which was incompatible with Article 5(1) in the absence of a derogation under Article 15 of the ECHR.[648]

Such was the extent of the restrictions permitted under Control Orders, the most fervent critics amongst civil society argued that the mechanisms amounted to criminal punishment without trial.[649] Some academics suggested that they 'amounted effectively to a form of severe punishment without conviction'.[650] Helen Fenwick and Gavin Phillipson have argued that fines, probation, community service and suspended prison sentences were less severe than being under a Control Order for two or three years.[651] In this regard, Lucia Zedner aptly described such preventative practice as amounting to pre-punishment.[652] In these circumstances, extremely onerous obligations could be placed upon individuals without any criminal conviction and therefore without the benefit of the full spectrum of criminal trial guarantees. Undoubtedly, the most controversial measures possible under the PTA 2005 concerned the lengthy curfews and forced relocation. As to the former restriction, some suggested that the longest curfews which were imposed on many subjects amounted 'to virtual house arrest…[with] the homes of controlled persons being turned into "domestic prisons".'[653] As to the latter, the IRTL revealed that of the 52 Control Order subjects, 23 were forcibly relocated for national security or practical reasons.[654]

When the mechanisms were inevitably challenged in court, the House of Lords strongly shaped the direction the Control Order regime would take, which would in turn have a knock

[648] ibid.
[649] See for example Liberty, 'Unsafe and Unfair – Discredited Control Order Regime up for Renewal Again', Press Release (1 February 2010) at https://www.liberty-human-rights.org.uk/news/press-releases/unsafe-and-unfair-%E2%80%93-discredited-control-order-regime-renewal-again; C. Ferguson, 'Counter-Terrorism and Punishment without Trial', *Law Society Gazette* (3 February 2011) at http://www.lawgazette.co.uk/analysis/counter-terrorism-and-punishment-without-trial/58984.fullarticle.
[650] Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52) 878.
[651] ibid.
[652] Zedner, 'Preventive Justice or Pre-Punishment? (n. 82).
[653] K. D. Ewing & J.-C. Tham, 'The Continuing Futility of the Human Rights Act' [2008] 4 PL 668, at 675.
[654] Anderson, 'Control Orders in 2011' (n. 6) para 3.34.

on effect and shape the parameters of subsequent counter-terrorist hybrid orders. In three of the most significant Control Order cases that reached the court; *JJ, MB and AF,* and *AF (No. 3)*, the House of Lords delivered important judgments that placed significant pressure upon the British Government to modify the Control Order regime in a number of ways.[655] The first substantial legal challenge to the Control Order regime reached the House of Lords in July 2007 with four appeals which were heard together. The individuals were each subjected to non-derogating Control Orders and the complaints concerned the compatibility of Control Orders with Articles 5 and 6 of the ECHR. However, due to the distinguishing facts of the four appeals, separate judgments were passed down.

In *JJ*, the most important distinguishing feature was that the six individuals were subjected to 18 hour curfews.[656] In a complex and split 3:2 decision, the House of Lords dismissed the SSHD's appeal against the Court of Appeal and held that the individuals' right to liberty had been violated.[657] Delivering the first judgment, Lord Bingham cited the *Engel* and *Guzzardi* cases before the ECtHR in which the Court held that when assessing whether a deprivation of liberty had occurred, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question.[658] Lord Bingham concluded that through a combination of the 18 hour curfew and the exclusion of social visitors, the controlees were in practice in solitary

[655] *SSHD v. JJ and others* [2007] UKHL 45, [2008] 1 AC 385 ('*SSHD v. JJ*'); *SSHD v. MB and AF* [2007] UKHL 46, [2008] 1 AC 440; *SSHD v. AF and another* [2009] UKHL 28, [2010] 2 AC 269 ('*SSHD v. AF (No. 3)*').

[656] *SSHD v. JJ* (n. 655). Before reaching the House of Lords, Sullivan J in the High Court held that the obligations imposed on the individuals violated Article 5 of the ECHR and that the Control Orders should be quashed. See *SSHD v. JJ* [2006] EWHC 1623. The Court of Appeal dismissed the Secretary of State's appeal. See *SSHD v. JJ* [2006] EWCA Civ 1141, [2007] QB 446.

[657] For commentary see S. Foster, 'Control Orders, Human Rights and the House of Lords' (2007) 12 *Coventry Law Journal* 27; C. Walker, 'Terrorism: Prevention of Terrorism Act 2005 ss. 2 and 3 - Non-Derogating Control Order - Whether "Deprivation of Liberty" under European Convention on Human Rights Art. 5' (2008) 6 *Crim. LR* 486; C. Forsyth, 'Control Orders, Conditions Precedent and Compliance with Article 6(1)' (2008) 67 *Crim. LR* 1; D. Feldman, 'Deprivation of Liberty in Anti-Terrorism Law' (2008) 67 *Cambridge Law Journal* 4.

[658] *Engel v. The Netherlands* (n. 189) para 59; *Guzzardi v. Italy* (App. no. 7367/76) ECtHR, 6 November 1980, paras 92 & 94 as cited in *SSHD v. JJ* (n. 655) at para 16. In *Guzzardi*, the ECtHR held that the deprivation of liberty may take forms other than classic detention in prison or strict arrest imposed on a serviceman (para 95). Furthermore, the ECtHR recognised that 'the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance' (para 93).

confinement.[659] However, only Lord Brown was tempted to speculate over the exact length of a curfew before it could be considered to violate Article 5, holding that the acceptable and absolute limit for a house curfew was 16 hours.[660] Due to the lengthy discussion in the related *MB and AF* judgment regarding the implications of Control Orders for Article 6, the Lords did not touch upon the right to a fair trial in *JJ*. Nevertheless, the case is important for illustrating the most extreme restrictions that could be imposed upon individuals who do benefit from the protections usually afforded under the criminal law.

In that regard, the second judgment arising from the four appeals, *MB and AF*, focussed upon the compatibility of Control Order proceedings with the right to a fair trial under Article 6 of the ECHR, as the court referred to the *JJ* judgment on the question of Article 5.[661] Lord Bingham delivered the lead opinion and helpfully summarised the conditions that one of the individuals was subject to. The passage is useful to cite in length, not only as the individual's particular case is arguably the most important of the Control Order regime, but also as it amounts to a typical depiction of the restrictions that Control Orders could impose:

> AF was required to remain in the flat where he was already living (not including any communal area) at all times save for a period of 10 hours between 8 am and 6 pm. He was thus subject to a 14 hour curfew. He was required to wear an electronic tag at all times. He was restricted during non-curfew hours to an area of about 9 square miles bounded by a number

[659] *SSHD v. JJ* (n. 655) para 24. Baroness Hale (paras 61-63) and Lord Brown (paras 105-109) also considered that the individual's right to liberty had been violated by the curfews.
[660] ibid, paras 103-105. The Home Office then modified all existing Control Orders to include a maximum curfew of 16 hours, actually increasing the length of some existing curfews. See JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2007-08, HL 57, HC 356) para 39. Note however *SSHD v. AP* [2010] UKSC 24, in which the Supreme Court held that a Control Order imposing a 16 hour curfew and the relocation of the individual 150 miles from his home violated Article 5 of the ECHR.
[661] *SSHD v. MB and AF* (n. 655). Before *MB's* appeal reached the House of Lords, Sullivan J in the High Court maintained the Control Order but issued a declaration of incompatibility in respect of s. 3 of the PTA 2005 concerning the supervision of the court, as the individual's right to a fair hearing had not been satisfied. See *Re: MB* [2006] EWHC 1000. However, the Court of Appeal allowed the Secretary of State's appeal and set aside the declaration of incompatibility. See *SSHD v. MB* [2006] EWCA Civ 1140, [2007] QB 415. Before *AF's* appeal reached the House of Lords, Ouseley J in the High Court quashed the Control Order but dismissed the application for a declaration of incompatibility in respect of Article 6 of the ECHR. See *SSHD v. AF* [2007] EWHC 651 (Admin).

> of identified main roads and bisected by one. He was to report to a monitoring company on first leaving his flat after a curfew period had ended and on his last return before the next curfew period began. His flat was liable to be searched by the police at any time. During curfew hours he was not allowed to permit any person to enter his flat except his father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor's name, address, date of birth and photographic identification. He was not to communicate directly or indirectly at any time with a certain specified individual (and, later, several specified individuals). He was only permitted to attend one specified mosque. He was not permitted to have any communications equipment of any kind. He was to surrender his passport. He was prohibited from visiting airports, sea ports or certain railway stations, and was subject to additional obligations pertaining to his financial arrangements.[662]

Much of the judgment addressed the argument that Control Order proceedings under section 3 of the PTA 2005 should be considered the determination of a criminal charge and, therefore, invoke the criminal limb of the right to a fair trial. On this issue, Sullivan J in the High Court in *MB*'s case considered that he was bound by the Court of Appeal decision in *A v. SSHD*, which held that the civil limb applied in the proceedings under Part 4 of the ATCS Act 2001.[663] Similarly, the Court of Appeal did not consider the issue in depth but, nevertheless, expressed their opinion that Control Order proceedings under the PTA 2005 did not involve the determination of a criminal charge.[664]

[662] *SSHD v. MB and AF* (n. 655) para 7.
[663] *Re: MB* [2006] EWHC 1000, para 37, in reference to *A v. SSHD* [2002] EWCA Civ 1502, [2004] QB 335.
[664] *A v. SSHD* [2002] EWCA Civ 1502, [2004] QB 335.

In the House of Lords however, which is of course not bound by any other domestic court, the issue was given much attention. Lord Bingham referred to the JCHR who viewed that derogating Control Orders would engage the criminal limb of Article 6.[665] However, Lord Bingham and the remaining judges were unanimous that 'non-derogating control order proceedings do not involve the determination of a criminal charge' for the purpose of Article 6 of the ECHR.[666]

A particular focus was shown to the third *Engel* criteria which assessed the severity and nature of the penalty imposed. Although Lord Bingham accepted that the consequences of Control Orders could be 'devastating for individuals and their families',[667] a distinction had to be made between preventative measures and those which were punitive or retributive.[668] Lord Hoffmann similarly rejected the claim that a Control Order hearing amounted to the determination of a criminal charge, holding that 'as a matter of English law, this is beyond doubt'.[669] This was because the individuals were not charged with a breach of law, the order was made on the basis of suspicion about a possible future act rather than the determination of a past action, and finally that the restrictions imposed were to prevent rather than punish or deter.[670] Ultimately, amongst the abundance of case law that preceded and followed *MB and AF* which has considered the implementation and administration of Control Orders or similar counter-terrorist hybrid mechanisms, neither any UK domestic court nor the ECtHR has accepted that they should be classified and treated as criminal mechanisms.

However, the fact that non-derogating Control Orders proceedings were deemed not to amount to the determination of a criminal charge did not then remove the case from the applicability of Article 6 in its entirety. As Lord Carswell acknowledged, 'it is not in dispute

[665] JCHR, *Counter-Terrorism Policy and Human Rights* (n. 635) para 49, per Lord Bingham in *SSHD v. MB and AF* (n. 655) para 16.
[666] ibid, para 24.
[667] ibid, para 23, per Lord Bingham, citing A. Chaskalson, 'The Widening Gyre: Counter-Terrorism, Human Rights and the Rule of Law', Seventh Sir David Williams Lecture (11 May 2007) 15.
[668] *SSHD v. MB and AF* (n. 655) para 23.
[669] ibid, para 48.
[670] ibid.

that the civil limb of article 6(1) applies to the examination of control orders by the courts and the person subject to such an order...is entitled to a fair hearing'.[671]

Several years later, as the Control Order regime was set to be replaced by the new TPIM mechanism, the IRTL concluded that there was:

> [S]omething unsettling about any system which allows the executive to impose intrusive measures on the individual, challengeable only by way of a closed material procedure and after significant delay. Accordingly, while some compromise of fairness may be justifiable in the interests of national security, it is essential that the use of this and similar powers should be kept to an absolute minimum.[672]

The proposals for more permanent legislation meant that there was a possibility that some of the misgivings with the Control Order regime could be addressed. In that regard, with what became the Terrorism Prevention and Investigation Measures Bill,[673] the Home Office presented a memorandum addressing some concerns the Bill would raise insofar as the UK's obligations under the ECHR were concerned.[674] The Home Office considered *inter alia* the compatibility of the measures with Article 6 ECHR. The memorandum drew heavily upon Control Order jurisprudence and claimed that TPIM proceedings would engage the civil limb of Article 6 of the ECHR.[675] As already mentioned, the courts were unanimous that Control Order proceedings did not amount to the determination of a criminal charge, but rather that they concerned the determination of civil rights and obligations.

Due to its similarity with its predecessor regime, the TPIM regime has faced numerous criticisms over its lifespan thus far, particularly from human rights organisations and other

[671] ibid, para 79.
[672] Anderson, 'Control Orders in 2011' (n. 6) 7.
[673] See I. Dennis, 'Terrorism Prevention and Investigation Measures Bill' (2011) 10 *Crim. LR* 741; Walker & Horne (n. 564); Middleton, 'Terrorism Prevention and Investigation Measures: Constitutional Evolution, not Revolution?' (n. 564).
[674] Home Office, 'Terrorism Prevention and Investigation Measures (TPIM Bill), ECHR Memorandum by the Home Office' (19 May 2011).
[675] ibid, para 24.

pressure groups.[676] Despite the slightly less onerous measures permitted under a TPIM, the almost identical restrictions possible under the regime led Liberty to label the mechanism as a 'Control Order-lite'.[677] Going further, Liberty argued that the permanent legislation would replicate 'the worst excesses of punishment without trial under the control order regime'.[678] On the other hand, the IRTL argued that 'despite their structural similarities the TPIM is not a rebadged control order, but a new model'.[679] Inevitably, much of the critique directed towards the Control Order regime equally applies to the TPIM mechanism.

In this regard, one of the most recurring criticisms of TPIMs concerns its purported aim to be investigative in nature. During the drafting of the Bill, the JCHR warned that TPIMs would not go far enough to bring the restrictive regime back into the domain of criminal due process.[680] Furthermore, the JCHR suggested:

> [A]s the Bill currently stands it is clear that the overriding purpose of its provisions is prevention, not investigation and prosecution. Investigation of terrorism is very much a secondary purpose in the Bill as drafted.[681]

Following the enactment of the TPIM Act, the JCHR again considered that the TPIM regime was problematic insofar as it was purportedly investigative in nature. The JCHR concluded:

> Our inquiry has failed to find any evidence that TPIMs have led in practice to any more criminal prosecutions of terrorism suspects. This confirms the concerns we expressed in our scrutiny Reports on the Bill that the

[676] See for example A. Deane, 'Control Orders Lite', *Big Brother Watch* (26 January 2011) at http://www.bigbrotherwatch.org.uk/2011/01/control-orders-lite/; CagePrisoners, 'Joint Committee on Human Rights Review of Terrorism Preventative Investigation Measures Submission' (28 January 2013) at http://www.parliament.uk/documents/joint-committees/human-rights/Submission_from_Cageprisoners.pdf para 1.4.
[677] Liberty, 'TPIMs' at https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism/tpims. See also Dennis (n. 673).
[678] Liberty, 'Liberty's Second Reading Briefing on the Terrorism Prevention and Investigation Measures Bill' (June 2011) at https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-second-reading-briefing-on-the-terrorism-prevention-and-investigat.pdf.
[679] Anderson, 'Control Orders in 2011' (n. 6) 7 & para 1.5.
[680] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (2010-12, HL 180, HC 1432) para 1.21.
[681] ibid.

> replacement for control orders were not 'investigative' in any meaningful sense. In our view it is time to recognise that the epithet 'TPIMs' is a misnomer, because they are not investigative in nature. TPIMs should be referred to as Terrorism Prevention Orders, or something similar, to reflect the reality that their sole purpose is preventive, not investigative.[682]

Some academics have also drawn attention to this apparent contradiction. For example, Clive Walker and Alexander Horne have suggested that 'the main weakness in the TPIM Act arguably resides not so much in the reformulation of its prevention objective but in the feeble augmentation of its investigation objective'.[683] Going further, Helen Fenwick has argued that the idea that TPIMs are designed to enable investigation and prosecution of the individual 'should be openly abandoned'.[684]

Of equal if not greater concern are the circumstances in which a TPIM is imposed and the judicial oversight of the administration of the measures. At one extreme, Liberty have condemned TPIMs as replicating the predecessor Control Order regime, amounting to 'severe criminal-style punishment imposed by civil order completely divorced from the criminal justice system, in circumstances where the individual is not told details of the case against them'.[685]

For a number of reasons, there has been little judicial input regarding TPIMs of any significance for the purposes of this study. Firstly, as already mentioned, far fewer TPIMs have been issued than Control Orders were during the lifespan of the PTA 2005. Secondly, nine of those individuals served with TPIMs had already been subjected to Control Orders

[682] JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (n. 573) para 35.
[683] Walker & Horne (n. 564) 429.
[684] H. Fenwick, 'Redefining the Role of TPIMs in Combatting "Home Grown" Terrorism Within the Widening Counter-Terror Framework' (2015) 1 EHRLR 41, at 55.
[685] S. Farthing, Letter to the Joint Committee on Human Rights, *Liberty* (5 February 2013) at https://www.liberty-human-rights.org.uk/sites/default/files/letter-to-jchr-review-of-tpims-feb-2013-.pdf.

before the regime was replaced.[686] Finally, despite the differences between the two regimes, the fact that TPIMs are very similar in nature to its predecessor Control Order regime effectively meant that the courts would be hearing almost identical legal challenges.

Nevertheless, the first review hearing under section 9 of the TPIM Act came in March 2012 in *BM*.[687] *BM* was served with a TPIM in January 2012 after previously being under a Control Order. In the review hearing, Collins J discussed the difference in standards between Control Orders and TPIMs that the SSHD had to satisfy, acknowledging that reasonable belief was a higher standard than reasonable suspicion.[688] However, Collins J held that the difference in standards would not 'affect the basis for disclosure to provide fairness and compliance with Article 6'.[689]

As mentioned on a number of occasions, determining the nature of proceedings concerning counter-terrorist hybrid orders is fundamental to the task of ascertaining which fair trial guarantees are to apply in those proceedings. As this section has illustrated, the British Government has, to which Parliament and the judiciary have mostly acquiesced, maintained that the civil limb of the right to a fair trial, rather than the criminal limb, should apply in proceedings concerning the implementation of counter-terrorist hybrid orders.

Beginning with the landmark ruling in *MB and AF* in 2007 on this particular issue, the courts have maintained throughout the life of the Control Order regime, and subsequently with the TPIM mechanism, that proceedings concerning the implementation of the mechanisms do not amount to the determination of a criminal charge. In this regard, it is clear that the fair trial guarantees espoused under Article 6(2) and Article 6(3) of the ECHR are generally not applicable when the mechanisms are challenged in the courts. However, as Chapter 2 set out, the exact meaning of a 'fair hearing' as guaranteed under Article 6(1) incorporates a number of principles not expressly laid out in the clause, including the equality of arms and

[686] Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) para 2.3.
[687] *SSHD v. BM* [2012] EWHC 714 (Admin).
[688] ibid, para 4.
[689] ibid.

the right to adversarial proceedings. As the following sections will illustrate, in addition to basic common law principles such as open and natural justice, many fair trial guarantees are undoubtedly challenged when counter-terrorist hybrid orders are implemented and administered by the courts.

Unfortunately, the ECtHR has yet to consider a case concerning the three mechanisms explored in this thesis. The Court has, however, considered CMP and the Special Advocate regime on a number of occasions,[690] albeit not under Article 6 of the ECHR, with one further case, *Gulamhussein and Tariq v. UK*, currently pending before the Court which will examine the compatibility of CMP with Article 6 for the first time.[691] Of the cases that have been decided already, the Court's discussion in *A v. UK* touched upon the issue of disclosure and the degree to which Special Advocates can contribute to securing procedural justice insofar as Article 5 is concerned.[692] Nevertheless, taking into account other important ECtHR jurisprudence, it could be argued that when counter-terrorist hybrid orders are implemented and challenged in the courts, the proceedings should import the protections guaranteed under the criminal limb of the right to a fair trial pursuant to the *Engel* three stage test.[693]

Firstly, the ECtHR has attached significant weight to whether a measure potentially affects the public or whether a measure applies to a particular group or profession which would indicate it amounts to a disciplinary matter.[694] It is perhaps ironic that counter-terrorist hybrid orders are potentially applicable to all of the public rather than any narrow group, wholly due to the decision of the House of Lords in the *Belmarsh* case which found that the indefinite detention of non-British citizens under Part 4 of the ATCS Act 2001 was *inter alia* discriminatory against foreign nationals.[695] Secondly, as numerous commentators have

[690] *A v. UK* (n. 485); *I. R. and G. T. v. United Kingdom* (App. nos. 14876/12 & 63339/12) ECtHR, Admissibility Decision, 28 January 2014; *K2 v. United Kingdom* (App. no. 42387/13) ECtHR, Admissibility Decision, 9 March 2017.
[691] *Gulamhussein and Tariq v. UK* (App. nos. 46538/11; 3960/12) ECtHR.
[692] *A v. UK* (n. 485).
[693] *Engel v. The Netherlands* (n. 189).
[694] See Chapter 2, section 2.2.2, text accompanying ns. 203-206.
[695] *A v. SSHD* (n. 33).

acknowledged, the suspected conduct which represents the basis for imposing counter-terrorist hybrid orders is inherently terrorist-related and therefore generally of a criminal if not otherwise extremely serious nature. Thirdly, the ECtHR has attached weight to whether proceedings are brought by a public authority acting under statutory provisions.[696] Clearly, the Home Secretary could impose a Control Order in the past, and now a TPIM or TEO, against an individual pursuant to her relevant statutory powers. Finally, and perhaps most importantly, the ECtHR has maintained that when determining if proceedings merit the invocation of criminal law fair trial guarantees, the nature and severity of a penalty is determined by reference to the maximum penalty which the law provides.[697]

At the extreme, the curfews imposed under some of the earliest Control Orders were found to have deprived the subjects of their right to liberty under Article 5 of the ECHR, indicating immediately that the restrictions could, at least in practical terms, be similar to the deprivation of liberty which individuals may encounter when imprisoned.[698] In that regard, the 18 hour curfews that were imposed upon early Control Order subjects represented the most extreme condition imposed upon any individual yet subjected to a counter-terrorist hybrid order. The JCHR have similarly suggested that the restrictions possible under the early Control Orders amounted to a determination of a criminal charge.[699]

Although the maximum lengths of curfews under Control Orders were scaled down, and further still with TPIMs, the fact remained that any breach of the conditions of a Control Order could be met with five years' imprisonment, a fine, or both.[700] Under the replacement TPIM mechanism, an identical punishment is possible for any breach of the attached conditions, although in the case of a travel measure violation, the maximum custodial

[696] *Benham v. UK (*n. 200).
[697] *Engel v. The Netherlands* (n. 189) para 82. See Chapter 2, section 2.2.3 more generally.
[698] *SSHD v. JJ* (n. 655). See also Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52) 878.
[699] JCHR, *Counter-Terrorism Policy and Human Rights* (n. 635) para 51.
[700] PTA 2005, s. 9(4)(a).

sentence is now 10 years.[701] Finally, with the recent introduction of the TEO mechanism, any breach of a condition attached to the 'permit to return' can similarly be met with five years' imprisonment, a fine, or both.[702]

Whilst the degree of severity of the penalties for breaching the conditions attached to counter-terrorist hybrid orders is undoubtedly quite severe, if the maximum prison sentence is indeed imposed, their actual use following conviction has been extremely limited due to the low prosecution and conviction rates. As the IRTL has revealed, over the lifetime of the Control Order mechanism 14 individuals were prosecuted for breaching the conditions attached to their Control Orders, but only two individuals were actually convicted, one receiving a prison sentence of 20 weeks and the other 15 months.[703] In respect of TPIMs, there have been at least three convictions so far for the breach of conditions attached to a TPIM notice, each resulting in a substantial prison sentence.[704]

In reality, it has proven extremely difficult to prosecute individuals for breaching the conditions attached to their mechanisms, owing to *inter alia,* the time and resources needed to compile evidence, the tendency of juries to acquit what they perceive as minor breaches of apparently mundane conditions, and the difficulties of disclosing intelligence-gathering techniques in court.[705] As such, the vast majority of breaches of Control Orders and TPIMs have not been prosecuted.[706]

[701] TPIM Act 2011, s. 23(3)(a); CTS Act 2015, s. 17(4).
[702] CTS Act 2015, s. 10(5)(a).
[703] Anderson, 'Terrorism Prevention and Investigation Measures in 2013' (n. 553) para 5.2, in reference to Anderson, 'Control Orders in 2011' (n. 6) paras 3.61-3.62.
[704] See n. 572 above in respect of the individual known as 'DD' who was sentenced to two substantial prison sentences for breaching the conditions under his TPIM notice. In 2016, an individual was prosecuted for breaching the conditions under his TPIM notice and sentenced to 20 months' imprisonment. See A. Rudd, SSHD, HC Deb 15 December 2016 (n. 587).
[705] Anderson, Terrorism Prevention and Investigation Measures in 2012' (n. 553) paras 10.5(a)-(e).
[706] As the reports of the IRTL reveal, the CPS has often discontinued prosecutions. For example, in 2013, three individuals, AY, CC and CE, were each accused of tampering with their tags but following the presentation of expert evidence suggesting that the damage to their tags could have come from other sources, the CPS discontinued the prosecutions. See Anderson, 'Terrorism Prevention and Investigation Measures in 2013' (n. 553) para 5.7.

3.4.2 Closed Material Procedures: The Administration of 'Kafkaesque' Trials

As already mentioned, when counter-terrorist hybrid orders are implemented or reviewed in the courts, the proceedings can be heard under CMP.[707] The justifications advanced by proponents for the use of CMP are multifaceted. One of the most overarching arguments is emphasised strongly in the Justice and Security Green Paper,[708] and relates to the apparent frustrations felt by the Government regarding rules of disclosure and the perceived inadequacies of the law of Public Interest Immunity (PII).[709] According to the Home Secretary at the time, this 'rendered the UK justice system unable to pass judgment' on vital matters, leading to the collapse of cases or out of court settlements.[710]

The Green Paper went further and argued that certain sensitive evidence should not be disclosed in public due to the potentially grave implications for national security.[711] More specifically, the Green Paper argued that disclosing evidence obtained from covert human intelligence sources, informers, or other sources providing intelligence could endanger lives, and that particular methods of surveillance should remain secret in order to ensure their effectiveness.[712] It is also often claimed that disclosing intelligence can 'break promises to foreign countries that shared intelligence would be kept secret'.[713]

[707] Schedule to the PTA 2005 and Part 76 of the CPR; Schedule 4 to the TPIM Act 2011 and Part 80 of the CPR; Schedule 3 to the CTS Act 2015 and Part 88 of the CPR.
[708] Ministry of Justice, *Justice and Security Green Paper* (Cmd 8194, 2011).
[709] Under the common law, if the Government does not wish to disclose certain evidence to the public on the grounds of national security, it can apply to the court to grant permission to withhold such information. The balancing test is between the public interest to withhold the evidence (on the grounds of national security) and the interests of justice to disclose the evidence (open justice). If the public interest in withholding the information outweighs the public interest in disclosing it, that evidence must not be disclosed. However, if a PII certificate is granted, that evidence is excluded from proceedings altogether.
[710] Ministry of Justice, *Justice and Security Green Paper* (n. 708) vii.
[711] The Paper stated: 'The first duty of government is to safeguard our national security. In delivering this duty, the Government produces and receives sensitive information. This information must be protected appropriately, as failure to do so may compromise investigations, endanger lives and ultimately diminish our ability to keep the country safe'. See Ministry of Justice, *Justice and Security Green Paper* (n. 708) xi.
[712] Ibid, xii.
[713] Roach, 'Secret Evidence and Its Alternatives' (n. 59) 181.

As much of the evidence presented by the executive to support the implementation of a counter-terrorist hybrid order is presumably obtained in the ways just described, it is perhaps inevitable that such cases rest heavily upon sensitive material and are therefore necessarily conducted in closed sessions. On the flip side of the coin it is also argued, perhaps disingenuously, that the use of CMP can benefit the individuals who are subject to the proceedings and the public more broadly. This is because the full range of evidence held by the Government can be tested in court by an individual's Special Advocate which therefore enhances the procedural fairness of proceedings,[714] albeit on an *ex parte* and *in camera* basis. Moreover, it is suggested that the practice of CMP allows accusations against the State to be tested in court, although again this is on an *ex parte* and *in camera* basis.[715]

For the purposes of this study, the use of CMP challenges several fair trial guarantees that are applicable in all proceedings regardless of their characterisation as civil or criminal in nature. These include the principles of natural and open justice, as well as more specific guarantees such as the right to be heard, to confront one's accuser, to an adversarial trial, the equality of arms, and the right to a reasoned judgment. As such, the limited judicial oversight of hybrid orders under CMP presents new and unique challenges. When each aspect of CMP is considered in isolation, the implications for these fair trial guarantees are significant, but when analysed collectively, the consequences for the right to a fair trial are drastic.

With regards to the use of CMP in Control Order proceedings, the JCHR expressed their difficulty in finding that the procedure was compatible with the right to a fair trial. In particular, the JCHR questioned the regime's compatibility with:

> Article 6(1), the equality of arms inherent in that guarantee, the right of access to a court to contest the lawfulness of their detention in Article 5(4), the presumption of innocence in Article 6(2), the right to examine

[714] Ministry of Justice, *Justice and Security Green Paper* (n. 708) xiii & 21.
[715] ibid.

> witnesses in Article 6(3), or the most basic principles of a fair hearing and due process long recognised as fundamental by English law.[716]

Such strong criticism implied that, in the JCHR's view, the criminal limb of the right to a fair trial should have applied but, as discussed above, the courts have consistently rejected this position.[717] Nevertheless, when trials are heard *ex parte* and *in camera*, the implications for the principle of open justice are obvious. Equally clear however is that Article 6(1) of the ECHR directly addresses the legitimate need for the press and public to be excluded from trial in the interests of national security.[718] Nevertheless, excluding the individual from trial altogether is another matter. As Lord Dyson made clear in *Al Rawi v. The Security Service*, CMP 'involves a departure from both the open justice and the natural justice principles'.[719] The challenges to the principle of natural justice are equally apparent. If one considers Lord Denning's famous dicta in *Kanda v. Government of the Federation of Malaya*,[720] the individuals subjected to counter-terrorist hybrid orders are clearly denied the right to know the full case against them, the right to hear the evidence used against them, and the chance to contest that evidence.

Insofar as the right to an adversarial trial and the equality of arms is concerned, it cannot be doubted that an individual subjected to and challenging a counter-terrorist hybrid order is at an extremely disadvantaged position. They are not fully informed of the allegations against them, they are excluded from the trial, and their contact with their Special Advocate is almost entirely prohibited once the Advocate has been served with the closed material.[721] Moreover, it is often argued that much of the evidence presented against individuals is not sufficiently robust due to it being of a second, or even third hand nature, otherwise known as hearsay

[716] JCHR, *Counter-Terrorism Policy and Human Rights* (n. 635) para 76.
[717] See above, section 3.4.1.
[718] Art. 6(1) ECHR.
[719] *Al Rawi and others v. The Security Service* [2011] UKSC 34, para 14.
[720] *Kanda v. Government of the Federation of Malaya* (n. 253).
[721] For further analysis of the role of the Special Advocate, see section 3.5.2 below.

evidence, which would in other proceedings normally be excluded.[722] The fact that such evidence is subjected to very limited cross-examination by a Special Advocate only moves to further undermine the fairness of CMP. Lord Hope in the *Bank Mellat* case acknowledged that CMP 'will result in every case in an inequality of arms between the State, which will always be the party who invokes the procedure and will always have access to that material, and the other party against whom the State has taken action and to whom access to that material is always denied'.[723] In that regard, Eric Metcalfe has forcefully argued why 'secret evidence' should not be used for six reasons: it is unreliable; it is unfair; it is undemocratic; it is damaging to the integrity of the courts and the rule of law; it weakens security; and it is unnecessary.[724]

In addition to the Control Order and TPIM regimes which expressly provided for the use of CMP, the use of CMP in other proceedings involving national security concerns steadily increased after 9/11.[725] However, this was often done on a common law basis, with the courts granting the request of the State to hear trials in closed session. In *Al Rawi* in 2011, the Supreme Court had to consider whether a court has the power under the common law to order a civil claim for damages to be heard in whole or in part under CMP.[726] Triggering the claim for damages was the alleged complicity of the Security Service in the respondent's detention, rendition and mistreatment in Guantánamo Bay.[727]

The Supreme Court decided that there was no such common law power to hold proceedings under CMP, and in the process provided a wealth of useful critique of CMP in

[722] Equality and Human Rights Commission, 'Article 6: The Right to a Fair Trial' in *Human Rights Review 2012: How Fair Is Britain? An Assessment of How Well Public Authorities Protect Human Rights* (March 2012) 235. Note however, *Al-Khawaja and Tahery v. UK* (n. 372) in which the ECtHR held that convictions based wholly or largely on hearsay evidence do not automatically violate Article 6 of the ECHR.
[723] *Bank Mellat v. HM Treasury (No. 1) and (No. 2)* [2013] UKSC 38 and 39, para 96.
[724] Metcalfe, 'Secret Evidence' (n. 99) paras 409-437.
[725] See Chapter 4, section 4.5.1.
[726] *Al Rawi v. The Security Service* (n. 719). See J. Ip, '*Al Rawi*, *Tariq*, and the Future of Closed Material Procedures and Special Advocates' (2012) 75 MLR 606.
[727] The Security Service wished to rely upon sensitive material, which if disclosed could be against the public interest.

proceedings.[728] Lord Dyson stressed that 'the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that'.[729] Going further, Lord Dyson suggested that the Government would have to implement legislation for CMP to be applicable in civil proceedings in circumstances not already prescribed.[730] Lord Kerr was equally critical, holding that 'the right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness'.[731]

Finally, the use and further expansion of CMP in the English legal system has not escaped criticism on the international scale. In 2015, the HRC expressed its concern at the extension of CMP into civil procedures following the enactment of the JSA 2013.[732] The Committee noted the serious concerns in relation to the safeguards in place, and the Special Advocate system in particular. Ultimately, the Committee noted that States should ensure that the restrictions or limitations on fair trial guarantees based on national security grounds, including the use of CMP, are fully compliant with obligations under the ICCPR.[733]

3.4.3 The Extra-Territorial Implications of TEOs

In addition to the challenges already discussed in the context of Control Orders and TPIMs, TEOs by their very nature present further unique challenges for human rights.[734] For example, due to the nature and purpose of TEOs, the exclusion of British citizens from British territory, even if temporary, may encourage other States to replicate such behaviour,

[728] In response, the Coalition Government indicated that it would consider extending the possibility of CMP to all civil proceedings.
[729] *Al Rawi v. The Security Service* (n. 719) para 35.
[730] ibid, para 47.
[731] ibid, para 89.
[732] HRC, *Concluding Observations of the United Kingdom of Great Britain and Northern Ireland* (114th session, 17 August 2015) UN Doc. CCPR/C/GBR/CO/7, para 22.
[733] ibid. The Committee also stressed this in the context of cases involving serious human rights violations and the need to prevent obstacles in cases establishing State responsibility and accountability.
[734] Helen Fenwick has argued that 'TEOS are *more* likely to create tensions with human rights norms than TPIMs'. See Fenwick, 'Probing Theresa May's Response to the Recent Terror Attacks' (n. 598) 343 (emphasis supplied).

or leave the UK in a position of violating its obligations to other States.[735] Others have warned that TEOs may dissuade individuals from returning to the UK altogether and encourage 'the adoption of terrorism as a way of life', which might be counter-productive if individuals are further alienated and acquire greater expertise in the tactics of warfare and terror.[736]

Insofar as the right to a fair trial is concerned, given that an individual would, by definition, be in a foreign country when served with a TEO, ascertaining whether the UK's human rights obligations apply extra-territorially in this context is problematic. In a memorandum prepared by the Home Office on the Counter-Terrorism and Security Bill, the Home Office asserted that, as TEOs would only be imposed on subjects outside the UK, the ECHR would not be directly engaged.[737] Nevertheless, as Guy Goodwin-Gill has argued, it is 'somewhat surprising' that the Home Office has suggested that a decision to exclude British citizens from the UK would not directly engage their rights under the ECHR.[738] As is widely known, jurisdiction for the purposes of Article 1 of the ECHR is primarily territorial,[739] but can extend

[735] The IRTL has warned that other States may engage in reciprocal behaviour, leading to suspected foreign terrorists being held on British territory despite the Government's desire to deport them. See JCHR, *Counter-Terrorism and Human Rights: Oral evidence* (26 November 2014, HC 836) Q. 12. Guy Goodwin-Gill has argued that the regime may put the UK in a position where it is evading its obligations to other States to counter terrorism. See G. Goodwin-Gill, '"Temporary Exclusion Orders" and their Implications for the United Kingdom's International Legal Obligations', *written evidence to the Joint Committee on Human Rights* (2 December 2014); G. Goodwin-Gill, '"Temporary Exclusion Orders" and their Implications for the United Kingdom's International Legal Obligations, Part II', *Blog of the European Journal of International Law* (9 December 2014) at http://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-ii/.

[736] Walker & Blackbourn (n. 596) 852.

[737] Home Office, 'Counter Terrorism and Security Bill, ECHR Memorandum by the Home Office' (26 November 2014) para 10. However, the Memorandum acknowledged that a TEO may involve a 'temporary interference with the individual's ability to enjoy his or her family and private life in the UK' and the lives of an individual's family and other social contacts (para 15).

[738] See G. Goodwin-Gill, '"Temporary Exclusion Orders" and their Implications for the United Kingdom's International Legal Obligations, Part I', *Blog of the European Journal of International Law* (8 December 2014) at http://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-i/.

[739] *Banković and others v. Belgium* (App. no. 52207/99) ECtHR [GC], Admissibility Decision, 12 December 2001.

to instances in which a State exercises effective control or State agents exercise authority and control abroad.[740]

Furthermore, individuals subjected to TEOs may be denied recourse to judicial process for a number of reasons.[741] Firstly, given the fact that individuals may be in remote and conflict-torn areas, it may prove difficult for the Home Secretary to inform them of their status in accordance with her obligation under the CTS Act 2015.[742] Secondly, once an individual has been informed that they are subjected to a TEO, they would by definition have to pursue any legal challenges from abroad, which would be limited to *ex post facto* judicial review. As a result, the ability of an individual subjected to a TEO to access a court in a practical and effective manner, which Article 6(1) of the ECHR generally guarantees for all individuals,[743] will be extremely difficult, if indeed possible at all.

As already mentioned, only one TEO has been implemented at the time of writing and there is no jurisprudence regarding TEOs to analyse. However, recent developments relating to 'non-suspensive appeals', and in particular, the rights of appeal against deportation orders, may shed some light as to how the right to a fair trial for an individual subject to a TEO may operate in practice. More specifically, it may be useful to consider the so-called 'deport first, appeal later' implications of section 94B of the Nationality, Immigration and Asylum Act 2002, as introduced by the Immigration Act 2014.[744] The power allows the Home Office to certify human rights claims made by individuals facing deportation to prevent them appealing their deportation from within the UK. In other words, individuals are forced to bring an appeal

[740] See for example *Jaloud v. The Netherlands* (App. no. 47708/08) ECtHR [GC], 20 November 2014; *Al-Skeini and others v. UK* (App. no. 55721/07) ECtHR [GC], 7 July 2011; *Al-Jedda v. UK* (App. no. 27021/08) ECtHR [GC], 7 July 2011.
[741] JCHR, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (n. 582) para 3.9.
[742] CTS Act 2015, s. 4(1)-(2).
[743] See Chapter 2 generally and in particular *Golder v. UK* (n. 230). See also *Bellet v. France* (n. 235) para 38; *Cañete de Goñi v. Spain* (App. no. 55782/00) ECtHR, 15 October 2002, para 34; *Nunes Dias v. Portugal* (App. nos. 69829/01; 2672/03) ECtHR, Admissibility Decision, 10 April 2003.
[744] H. Grant, 'UK Appeal Court Backs "Deport First, Appeal Later" Policy for Foreign Prisoners', *The Guardian* (13 October 2015).

from the country they are deported to, save for individuals who can prove beforehand that they will suffer 'serious irreversible harm' if they are deported.[745]

In the leading case concerning this certification power, *R (Kiarie and Byndloss) v. SSHD*, the Supreme Court held that the requirement for two individuals to appeal from abroad against the decision of the Home Office had denied them an effective appeal.[746] Before reaching the Supreme Court however, the Court of Appeal had criticised the 'serious irreversible harm' test, but it did not find that the 'deport first, appeal later' provision violated the obligation to provide procedural fairness.[747] Crucially, the Court cited *R (Gudanaviciene) v Director of Legal Aid Casework*, which concerned the circumstances in which the procedural guarantees inherent in Article 8 of the ECHR required the granting of legal aid in an immigration case involving a claim based on private and/or family life.[748] In *Gudanaviciene*, the Court considered that the procedural guarantees inherent to Article 8 of the ECHR were in practice the same as Article 6.[749]

In *Kiarie and Byndloss*, the appellants argued in the Court of Appeal that the 'deport first, appeal later' power deprived them of procedural fairness inherent to Article 8 for a number of reasons, each of which may be relevant to individuals subject to a TEO wishing to challenge the SSHD. The appellants argued that 'out of country appeals are said to be generally less effective than in country appeals';[750] that they 'would be faced with significant practical

[745] Home Office, Guidance on Section 94B of the Nationality, Immigration and Asylum Act 2002 (9 May 2016).
[746] *R (Kiarie and Byndloss) v. SSHD* [2017] UKSC 42.
[747] *R (Kiarie and Byndloss) v. SSHD* [2015] EWCA Civ 1020.
[748] *R (Gudanaviciene) v. Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247.
[749] ibid, para 47.
[750] The appellants cited the observations made by Sedley LJ in *R (BA (Nigeria)) v. SSHD* [2009] EWCA Civ 119, [2009] QB 686, para 21 who held '…the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases'. The appellants also cited the observations of Collins J in *R (MK (Tunisia)) v. SSHD* [2010] EWHC 2363 (Admin), as endorsed by the Court of Appeal in *R (E (Russia))* [2012] EWCA Civ 357, [2012] 1 WLR 3198, para 43, where Sullivan LJ held '…that common sense indicates that a claimant who has to pursue an appeal while he is out of the country faces considerable disadvantages, particularly in the context of an appeal to SIAC'.

difficulties in procuring, preparing and presenting evidence' for appeal;[751] that 'removal pending appeal would have a clear impact on the overall fairness of the proceedings, including the appearance of fairness';[752] and finally that 'requiring the appellant to pursue an appeal out of country would be likely to diminish his chances of success and, by parity of reasoning, to enhance the Secretary of State's prospects of successfully resisting the appeal'.[753]

Although the Court of Appeal acknowledged that an out of country appeal would be less advantageous to the appellant than an in country appeal,[754] the Court ultimately refused to accept that the appellants would be deprived of effective participation in the decision-making process and of a fair procedure. Richards LJ held that 'Article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness'.[755] Rather, Richards LJ stated that the SSHD was entitled to rely upon the existing specialist immigration tribunal system to ensure that an appellant is given effective access to a fair appeal process.[756] On the specific difficulties which an appellant might face when appealing from abroad, Richards LJ held that the availability of modern electronic communications would not present serious obstacles to the preparation or submission of witness statements or obtaining relevant documents for appeal.[757]

In the Supreme Court, however, the requirement for the two individuals to appeal against their deportation from abroad was found to have violated the right to procedural fairness

[751] For example, the appellants argued that they 'would not be present in the United Kingdom to begin and pursue the process of evidence gathering, including obtaining witness statements and documentary evidence' relevant to his case, and the inability to be present at the proceedings.
[752] The appellants pointed to the different positions of the parties in the sense that an appellant out of country in serious circumstances, was against the SSHD who was the head of a well-resourced department, who pursues the appellant's deportation and will be represented at the hearing by a well-trained official or counsel.
[753] *R (Kiarie and Byndloss) v. SSHD* (n. 747) paras 54-58.
[754] ibid, para 64.
[755] ibid.
[756] ibid, para 65.
[757] ibid, para 66.

under Article 8 of the ECHR. Delivering the lead judgment, Lord Wilson held that the men and their lawyers would face practical difficulties communicating before and during their appeal,[758] and that for an effective appeal the appellants would need to be able to present live evidence as to their family ties and their reformed characters.[759] In that respect, Lord Wilson stressed that the financial and logistical barriers to giving evidence on screen are 'almost insurmountable',[760] which was particularly highlighted by the acknowledgement of academic research that 66% of First-tier Tribunal judges considered IT equipment in court to be poor.[761]

The implications of *Kiarie and Byndloss* can however be contrasted with another recent case which concerned the deprivation of citizenship and the barring of an individual from returning to the UK for national security reasons. In *K2 v. UK*, some similar challenges were made in respect of the procedural fairness under Article 8 of requiring an individual to mount a challenge from abroad.[762] In this case however, the ECtHR rejected the argument that the individual's right to procedural fairness had been violated, as Article 8 could not be 'interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision'.[763] Furthermore, of particular relevance to the nature of TEOs and the need for out-of-country appeals, the Court stated that it could not ignore the fact that K2 had chosen to leave the UK voluntarily which was the reason why the appeal had to be conducted from abroad.[764]

Clearly, the TEO regime replicates many of the features of Control Orders and TPIMs, which will inevitably lead to similar issues being raised about the substantive and procedural

[758] *R (Kiarie and Byndloss) v. SSHD* [2017] UKSC 42, para 60.
[759] ibid, paras 55 & 61.
[760] ibid, para 76.
[761] ibid, para 68.
[762] *K2 v. UK* (n. 690).
[763] ibid, para 57.
[764] Ibid, para 60.

fairness of the new mechanism. However, as discussed in this section, TEOs will present unique challenges to the right to a fair trial, the effects of which are not yet clearly known.

3.5 Mitigating the Unfairness

3.5.1 Minimum Disclosure

Attempts to mitigate the inherent unfairness of the mechanisms have come in two main ways. First, the courts have had a significant impact over the amount of disclosure that must be made to the individuals during the proceedings. Second, the relevant statutory regimes provide for the appointment of Special Advocates who represent the interests of the individuals.

The courts were initially inconsistent and unclear regarding the level of disclosure of the allegations that had to be made in order for the individual to be in a position to give effective instructions for their defence. In *MB and AF*, the first case before the House of Lords to consider the compatibility of Control Orders with the right to a fair trial, a majority of the Lords held that the right to a fair trial had been violated as insufficient disclosure had been made to the individuals to allow any effective challenge.[765] However, rather than issue a declaration of incompatibility under section 4 of the HRA 1998, the judges decided that the PTA 2005 could be 'read down' to make it rights-compliant under section 3 of the HRA. In particular, Lord Bingham cited *Roberts v. Parole Board*,[766] in which it was found that the 'concept of fairness imports a core, irreducible minimum of procedural protection'.[767] In light of this standard, Lord Bingham had difficulty accepting that MB and AF 'enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired'.[768] In 'reading down' the PTA, the majority of the House of

[765] *SSHD v. MB and AF* (n. 655).
[766] *Roberts (FC) (Appellant) v. Parole Board (Respondents)* [2005] UKHL 45.
[767] *SSHD v. MB and AF* (n. 655) para 43.
[768] ibid, para 41.

Lords effectively recognised the seriousness of the potential consequences of Control Orders, and therefore increased the measure of procedural protection that had to be afforded to the controlee under Article 6 of the ECHR.[769]

Having delivered somewhat inconsistent judgments in *MB and AF*, the House of Lords delivered the most decisive ruling on the level of disclosure required to satisfy the requirements of Article 6(1) in *AF (No. 3)*,[770] which came before the court just weeks after the significant ECtHR decision in *A* v. *UK*.[771] In *A v. UK*, whilst affirming the earlier decision of the House of Lords in 2004,[772] the ECtHR also 'addressed the extent to which the admission of closed material was compatible with the fair trial requirements of article 5(4)'.[773] Ultimately, the ECtHR found that the individual had to be provided with sufficient information about the allegations against him to enable him to give effective instructions for his defence.[774] As such, the House of Lords was immediately confronted with a compelling Strasbourg decision on a closely related matter, which the Law Lords could not ignore under the court's statutory duty to take Strasbourg judgments 'into account'.[775]

In *AF (No 3)*, the three appellants were 'subject to non-derogating control orders involving significant restriction of liberty', with the conjoined appeals focussing upon whether 'the procedure that resulted in the making of the control order satisfied the appellant's right to a

[769] See the opinions of Lord Bingham (para 44), Baroness Hale (para 72), Lord Carswell (para 84) and Lord Brown (para 92). See A. Lynch, 'Special Measures: Terrorism and Control Orders' in B. Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014) 515.
[770] *SSHD v. AF (No. 3)* (n. 655). Due to the conjoined nature of the appeals to the House of Lords, the appellate history of the case is complex. Before reaching the House of Lords, the Court of Appeal heard four individual appeals, three of which came from the SSHD in *AF*, *AM*, and *AN*, whilst the fourth, *AE*, came from the appellant. See *SSHD v. AF, AM and AN and another action* [2008] EWCA Civ 1148. *AE* was appealing against the decision of Silber J in the High Court who held that *AE* had enjoyed a fair trial (see *SSHD v. AE* [2008] EWHC 132 (Admin), [2008] EWHC 585 (Admin)), whilst the SSHD was appealing against the decisions of Stanley Burnton J in *AF* (see *SSHD v. AF* [2007] EWHC 2828 (Admin)), Sullivan J in *AM* (unreported), and Mitting J in *AN* (see *SSHD v. AN* [2008] EWHC 372 (Admin)), all of whom held in favour of the controlee. The Court of Appeal dismissed *AE*'s appeal, allowed the SSHD's appeal in *AN* and *AF*, but rejected the SSHD's appeal in *AM*. The Court of Appeal gave AF, AN and AE permission to appeal to the House of Lords but rejected this for AM.
[771] *A v. UK* (n. 485). See S. Foster, 'The Fight Against Terrorism, Detention without Trial and Human Rights' (2009) 14 *Coventry Law Journal* 4.
[772] *A v. SSHD* (n. 33).
[773] *SSHD v. AF (No. 3)* (n. 655) para 44.
[774] *A v. UK* (n. 485) para 220. See in particular D. Kelman, 'Closed Trials and Secret Allegations: An Analysis of the "Gisting" Requirement' (2016) 80 *J. Crim. L.* 264.
[775] HRA 1998, s. 2(1)(a).

fair hearing'.[776] Lord Phillips delivered the leading judgment in which a great deal of attention was shown to the appeal history and the ECtHR decision of *A v. UK*. The nine judges were unanimous that the appeals had to be allowed because the necessary disclosures to each appellant had not been made. The essence of the ECtHR decision, to which the nine judges adhered, was that 'the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations'.[777] Crucially, Lord Phillips also raised public policy concerns regarding the procedures used in issuing a Control Order. He spoke of a 'rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him'.[778] Most significantly, Lord Phillips considered that 'if the wider public are to have confidence in the justice system, they need to able to see that justice is done rather than being asked to take it on trust'.[779]

Lord Scott summarised the result effectively:

> Does a judicial process the purpose of which is to impose, or to confirm the imposition of, onerous obligations on individuals on grounds and evidence of which they are not and cannot be informed constitute a fair hearing? The judgment of the Grand Chamber in A v United Kingdom has made clear that, for the purpose of Strasbourg jurisprudence and Article 6(1) of the Convention, it does not.[780]

Despite the unanimous judgment, Lord Hoffmann in particular was reluctant to follow the Strasbourg line, doing so only 'with very considerable regret'.[781] Lord Hoffmann went as far

[776] *SSHD v. AF (No. 3)* (n. 655) para 1. For analysis see M. Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 448; M. Elliott, 'Stop Press: Kafkaesque Procedures are Unfair' (2009) 68 *Cambridge Law Journal* 495; B. Middleton, 'Secret Control Order Hearings: A Qualified Victory for the Right to a Fair Trial' (2009) 73 *J. Crim. L.* 389; A. Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 MLR 824; C. Dobson, 'Procedural Fairness Before the House of Lords: A Fair Procedure or a Fair Result?' (2009) 14 *Judicial Review* 340.
[777] *SSHD v. AF (No. 3)* (n. 655) para 59 in reference to *A v. UK* (n. 485) para 220.
[778] *SSHD v. AF (No. 3)* (n. 655) para 63.
[779] ibid.
[780] ibid, para 96.
[781] ibid, para 70.

as suggesting the Strasbourg judgment in *A v. UK* was wrong and could even destroy the Control Order regime and damage the UK's defences against the threat of terrorism.[782] According to Lord Hoffmann, the ECtHR had 'imposed a rigid rule that the requirements of a fair hearing are *never* satisfied if the decision is based solely or to a decisive degree on closed material', which ran contrary to previous House of Lords jurisprudence.[783] This was undesirable for Lord Hoffmann, who held that 'the particular procedures which have to be followed to make a hearing fair cannot…be stated in rigid rules'.[784]

Following the ECtHR's judgment in *A v. UK*, and the subsequent reiteration by the House of Lords of the irreducible minimum of disclosure needed for a Control Order hearing to satisfy Article 6, the UK Government was once again placed in a difficult position. The various court judgments, some of which have been analysed in this section, had clearly 'chipped away' at the Control Order regime over time.[785]

Having definitively settled the issue for the Control Order regime, it was clear that similar problems would arise with the replacement TPIM regime. In *BM*, the crucial question was whether there had been sufficient disclosure to enable the individual to give meaningful instructions to his Special Advocates that they could act upon.[786] Accordingly, when deciding if the requirements under Article 6 of the ECHR had been met, Collins J identified the *AF (No. 3)* test which was adopted in light of the Strasbourg decision in *A v. UK*.[787] Although acknowledging that the restrictions under a TPIM were slightly less onerous than Control Orders, Collins J determined that the approach would be that set out in *AF (No.3)* as there

[782] ibid. In that regard, see *SSHD v. AT* [2012] EWCA Civ 42 in which the Court of Appeal upheld a challenge against a Control Order on the basis that the subject had not been given sufficient information about the allegations against him. Although not decided on the basis of the *AF (No. 3)* decision, note also *SSHD v. BM* [2011] EWCA Civ 366 in which the Court of Appeal allowed an appeal against the Home Secretary on the basis that the decision to impose the Control Order was flawed as it could not be shown to be necessary, because *inter alia* the evidence presented by the Home Secretary was 'vague and speculative'.
[783] *SSHD v. AF (No.3)* (n. 655) para 71.
[784] ibid, para 72.
[785] Liberty, *From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers* (Liberty, 2010) para 1.
[786] *SSHD v. BM* (n. 687) para 18.
[787] ibid, para 19.

was no material difference between the two regimes.[788] As such, there appears to be an identical approach when determining how much information the individual must receive in order to receive a fair trial. Although many TPIMs were reviewed in the courts following the first review hearing in *BM*, there is very little of substance to reflect upon insofar as the right to a fair trial is concerned.[789]

It remains to be seen whether the courts will insist that individuals faced with TEOs will also need to be provided with sufficient information so as to allow them to give effective instructions for their defence. The application of the principle for individuals stranded abroad will perhaps add another level of difficulty to the task. Ultimately, although the courts have since *AF (No. 3)* maintained the requirement for minimum disclosure in counter-terrorist hybrid orders, perhaps the best summary came from Lord Hope in that case who acknowledged that the 'principle is easy to state, but its application in practice is likely to be much more difficult'.[790]

3.5.2 Special Advocates

As already mentioned, Special Advocates were appointed to represent the interests of individuals in Control Order proceedings, as they are now in TPIM proceedings, and may also be appointed when TEOs are implemented or reviewed in the courts.[791] The two functions of Advocates were summarised by Sedley LJ in *Murungaru v. SSHD*:

> [F]irst, to test by cross-examination, evidence and argument the strength of the case for non-disclosure. Secondly, to the extent that non-disclosure is

[788] ibid, para 21.
[789] See for example *SSHD v. BF* [2012] EWHC 1718 (Admin); *SSHD v. AM* [2012] EWHC 1854 (Admin); *SSHD v. AY* [2012] EWHC 2054 (Admin); *SSHD v. CC and CF* [2012] EWHC 2837 (Admin); *SSHD v. CD* [2012] EWHC 3026 (Admin).
[790] *SSHD v. AF (No. 3)* (n. 655) para 85.
[791] Schedule to the PTA 2005, para 7 and Rules 76.23-76.25 of the CPR; Schedule 4 to the TPIM Act 2011, para 10 and Rules 80.19-80.21 of the CPR; Schedule 3 to the CTS Act 2015, para 10(1) and Rules 88.22-88.24 of the CPR. It is important to note, however, that not all closed hearings will involve the use of a Special Advocate, and not all instances in which a Special Advocate is used will hearings be heard in closed session. See JCHR, *The Justice and Security Green Paper: Oral Evidence* (2010-12, HC 1777v) Q. 171.

> maintained…to protect the interests of the appellant, a task which has to be carried out without taking instructions on any aspect of the closed material.[792]

Despite the cautious optimism that initially greeted the appointment of Special Advocates in SIAC proceedings in 1997,[793] confidence in the apparent safeguard soon faded as the implications of CMP for the right to a fair trial and the limited function of Advocates became clear. For example, in 2007, Lord Judd of the JCHR suggested, finding approval from one of the Advocates presenting evidence to the Committee, that:

> the public should be left in absolutely no doubt that what is happening… has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.[794]

The courts have voiced an inconsistent and unconvincing degree of support for the use of Special Advocates in proceedings. In *MB and AF*, which was the first time the House of Lords had to consider the role of Special Advocates in the administration of counter-terrorist hybrid orders, several judges voiced comparable scepticism.[795] Baroness Hale expressed her lack of confidence that 'Strasbourg would hold that every control order hearing in which the special advocate procedure had been used…would be sufficient to comply with article 6'.[796] Lord Brown expressed similar doubts, holding that 'the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so'.[797] Lord Bingham noted *Roberts v. Parole Board*

[792] *Murungaru v. SSHD* [2008] EWCA 1015 (Civ) para 17. See also Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* (n. 477) 23-24.
[793] Metcalfe, 'Secret Evidence' (n. 99) para 316.
[794] JCHR, *Counter–Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning* (n. 482) para 210 and Q. 85. See also J. Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20 *International Journal of Evidence and Proof* 343.
[795] See M. Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 314.
[796] *SSHD v. MB and AF* (n. 655) para 66.
[797] ibid, para 90.

where, in the much cited excerpt of his judgment, Lord Woolf held that the use of a Special Advocate was 'never a panacea for the grave disadvantages of a person affected not being aware of the case against him'.[798] For Lord Bingham:

> The reason is obvious. In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. 'Grave disadvantage' is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain.[799]

More famously in *Roberts v. Parole Board*, Lord Bingham aptly described the role of the Special Advocates as 'like taking blind shots at a hidden target'.[800] Going further, in *Al Rawi*, several judges noted the serious shortcomings of the Special Advocate system. Lord Neuberger in the Court of Appeal described them as 'a particularly poor substitute for the claimant's own advocate in an open hearing' and that their use 'cannot be guaranteed to ensure procedural justice'.[801] Lord Dyson referred to 'the limitations of the special advocate system' and the criticisms of the JCHR in its 2010 report.[802] Finally, Lord Kerr said that the

[798] *Roberts v. Parole Board* (n. 766) para 60.
[799] *SSHD v. MB and AF* (n. 655) para 35.
[800] *R (Roberts) v. Parole Board* [2006] 1 All ER 39, para 18.
[801] *Al Rawi and others v. The Security Service* [2010] EWCA Civ 482, paras 55 & 57.
[802] *Al Rawi v. The Security Service* (n. 719) para 37.

use of Advocates 'should never be regarded as an acceptable substitute for the compromise of a fundamental right'.[803]

However, there has been notable judicial discussion highlighting the important role that Special Advocates can play in an apparently otherwise flawed process. For example, in *MB and AF*, Lord Bingham held the use of Special Advocates could 'help to enhance the measure of procedural justice available to a controlled person'.[804] Baroness Hale held that 'with strenuous efforts from all, difficult and time consuming though it will be, it should usually be possible to accord the controlled person a substantial measure of procedural justice'.[805] Lord Hoffmann was the most confident in the procedure, suggesting that the ECtHR had directly identified the Canadian special advocate as the way in which the dilemma over closed material should be resolved.[806] He concluded that 'in principle the special advocate procedure provides sufficient safeguards to satisfy article 6'.[807] The ECtHR has also made some expressions of support for the Special Advocate system, most notably in *A v. UK*,[808] but also in other cases such as *I. R. & G. T. v. UK*,[809] and *K2 v. UK*.[810]

In addition to the widespread scepticism from many senior judges, criticism has also come from the Special Advocates themselves who are evidently at the very heart of the CMP process.[811] At one extreme, in December 2004, one Advocate resigned from his position, refusing to 'give a fig-leaf of respectability and legitimacy to a process' which he found odious.[812] More recently however, shortly before the TPIM Act came into force, the Coalition

[803] ibid, para 94.
[804] *SSHD v. MB and AF* (n. 655) para 35.
[805] ibid, para 66.
[806] ibid, para 51.
[807] ibid, para 54.
[808] See above n. 485 paras 219-220.
[809] *I. R. and G. T. v. United Kingdom* (n. 690) paras 58 & 63.
[810] *K2 v. UK* (n. 690) para 55.
[811] See for example Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (n. 795). Chamberlain, a practising Advocate, noted three limitations upon the ability of Advocates to perform their role: their lack of access to independent expertise and advice; the difficulty in challenging the Government's lack of disclosure; and the restrictions limiting contact between the Advocate and the individual once the Advocate has been served with the closed evidence.
[812] Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates: Oral evidence* (2004-05, HC 323-II) Q. 1.

Government published the Justice and Security Green Paper in October 2011 and opened up public consultation into the possibility of allowing for CMP to be authorised and implemented in any civil proceedings.[813] The consultation phase of the Green Paper provided an invaluable opportunity for policy-makers, lawyers, civil libertarians and other stakeholders to critique the use of CMP in the limited contexts in which it currently operated. The Special Advocates presented a damning response to the Green Paper and highlighted how the practice of CMP challenged the basic principles of natural justice and open justice. In their memorandum, 57 of the 69 appointed Advocates collectively rebuked the Government proposals, whilst none of the Advocates who did not sign it expressed active disagreement with its contents.[814] At the outset, the Special Advocates stated that CMP:

> represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own. They also undermine the principle that public justice should be dispensed in public.[815]

Despite the various attempts to improve the fairness of CMP, the Special Advocates nevertheless offered their critical verdict:

> Our experience…leaves us in no doubt that CMPs are inherently unfair; they do not 'work effectively', nor do they deliver real procedural fairness. The fact that such procedures may be operated so as to meet the minimum standards required by Article 6 of the ECHR, with such modification as has been required by the courts so as to reduce that inherent unfairness, does not and cannot make them objectively

[813] See also A. Wagner, 'Should More Trials be Held in Secret?', *UK Human Rights Blog* (1 December 2011) at http://ukhumanrightsblog.com/2011/12/01/should-more-trials-be-held-in-secret/.
[814] Ministry of Justice, *Justice and Security Green Paper*, Response to Consultation from Special Advocates (Cmd 8194, 2011) para 1.
[815] ibid, para 2(1).

> fair…Neither the provision of Special Advocates, however conscientious, nor (where applicable) the modifications to current CMPs required by the House of Lords decision in *AF (No.3)*, are capable of making CMPs 'fair' by any recognisable common law standards.[816]

In that regard, the Advocates drew attention to a number of factors they perceived to be problematic which challenged several fair trial guarantees, not least of all the equality of arms. The Advocates criticised the ban on communication with individuals; their inability to challenge non-disclosure; their lack of ability to call evidence; the lack of formal rules of evidence; systematic late disclosure by the Government; reluctant and 'iterative disclosure' when the *AF (No. 3)* rule applies; redacted closed documents; and finally a lack of 'a searchable database of closed judgments'.[817] In that regard, the use of secret intelligence as evidence raises problems as the Special Advocate can only test it to a very limited extent.[818] The Advocates expanded further when addressing the JCHR consultation, suggesting that the 'absolute bar on direct communication' between the Advocates and open representatives after the former had received the closed material was the most significant restriction on the ability of the Advocates to operate effectively.[819]

The JCHR similarly responded to the Justice and Security Green Paper and drew attention to what they perceived to be the 'inherent unfairness of closed material procedures'.[820] The JCHR noted that 'neither the provision of special advocates, nor the *AF (No.3)* disclosure obligation, where it applies, are capable of making CMPs "fair" by any recognisable common law standards'.[821] The JCHR had previously noted that in some cases, Advocates were only

[816] ibid, para 15.
[817] ibid, para 17. Similarly, Eric Metcalfe has argued that Special Advocates are restricted by the prohibition on communication with individuals; limitations on their access to evidence, including their practical inability to call witnesses, absence of disclosure of unused material and their lack of access to expertise; the absence of any mechanism to ensure their accountability; and the lack of formal control over their appointment. See Metcalfe, 'Secret Evidence' (n. 99) paras 367-405.
[818] Equality and Human Rights Commission, 'Article 6: The Right to a Fair Trial' (n. 722) 235.
[819] Ministry of Justice, *Justice and Security Green Paper*, Response to Consultation from Special Advocates (n. 814) para 27.
[820] JCHR, *The Justice and Security Green Paper* (2010-12, HL 286, HC 1777) paras 81-86.
[821] ibid, para 82.

presented with the closed material just before a hearing commenced, therefore limiting the time they had to scrutinise the evidence and mount a defence.[822]

However, acknowledging these issues and responding to a specific recommendation of the former IRTL in 2014 in respect of the TPIM regime,[823] the Government established a working group to discuss the concerns with the Special Advocate regime, seek solutions and to make recommendations.[824] It is also apparent that a court can refuse to enter into closed hearings, that Special Advocates have successfully argued for specific materials to be disclosed in open session, and that Advocates can communicate with the subjects after the case has moved into closed hearings if the court grants permission.[825] Nevertheless, the clear inadequacies of the Special Advocate system drew criticism from the UN, when in 2015 the HRC noted the widespread criticisms of the procedure for 'not securing sufficiently the rights of the affected parties, including equality of arms'.[826]

Despite the commendable assistance that Special Advocates can offer to individuals in closed proceedings, they are beset with obstacles which complicate the attempt to provide adequate procedural justice. It is certainly only a minority of judges, such as Lord Hoffmann, who have placed faith in the procedure. What is perhaps clear however, is that Special Advocates are not seen as a definitive solution to the unfairness of CMP, but merely a modest means of mitigating the unfairness. Returning to where there this section began, the situation is perhaps best summarised by Sedley LJ in *Murungaru v. SSHD* as follows:

> [T]he special advocate represents no-one. A special advocate system is thus not a substitute for the common law principle that everyone facing an accusation made by the State is entitled to a fair chance to know the

[822] JCHR, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation* (2009-10, HL 64, HC 395) paras 63-65.
[823] Anderson, 'TPIMs in 2013' (n. 553) 58.
[824] The working group produced draft court directions aimed at increasing the speed of the automatic court review stage. See SSHD, *Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011* (n. 586) para 52.
[825] ibid, paras 53-54.
[826] *Concluding Observations of the United Kingdom of Great Britain and Northern Ireland* (n. 732) para 22.

> evidence in support of it and to test and answer it in a public hearing. But it is the best procedure so far devised to mitigate the effect of trial without disclosure if such a trial is unavoidable.[827]

3.6 Conclusions

After briefly discussing the origins of the mechanisms that this thesis focusses on and outlining their respective statutory frameworks, this chapter has sought to evaluate the compatibility of the mechanisms with the right to a fair trial. Whilst the right to a fair trial is not systematically violated when counter-terrorist hybrid orders are administered, the chapter has argued that the mechanisms should be treated as criminal sanctions for the purposes of IHRL, which should, therefore, result in the more stringent criminal trial guarantees being incorporated into proceedings concerning their implementation and administration. Whilst this stance appears to be roundly rejected by the majority of political opinion and judicial reasoning in the UK, the chapter has argued that the nature of CMP and the extra-territorial nature of TEOs has nevertheless exposed several aspects of the mechanisms which seriously challenge the right to a fair trial. Lastly, the chapter has also assessed the measures that have been taken in the attempt to mitigate the more controversial aspects of the mechanisms, concluding that procedural fairness has been improved to some extent by the requirement of minimum disclosure and the appointment of Special Advocates in closed hearings.

[827] *Murungaru v. SSHD* (n. 792) para 17.

Chapter 4. The State of Perpetual Quasi-Emergency

4.1 Introduction

In light of the analysis in Chapters 2 and 3, this chapter asserts that, although counter-terrorist hybrid orders fall short of systematically violating the right to a fair trial according to the UK courts, the design, implementation and administration of the mechanisms does not meet with the long established standards of procedural fairness in the UK. Despite the UK's historically strong attachment to high human rights standards, some of the most controversial aspects of the mechanisms have encountered what could only be described as a mixed response from the legislature, courts and public in recent years. This can be, in and of itself, a cause for concern, but as often transpires with extraordinary laws, there is a risk of the exception being normalised and spreading to other areas of law.

Whilst the UK's approach to counter-terrorism is grounded in law enforcement which generally upholds high human rights standards, the framework and administration of counter-terrorist hybrid orders actually resembles the behaviour of States enduring 'prolonged emergencies'. This is so even though the UK purposefully does not acknowledge a state of emergency or formally derogate from its obligations under IHRL. In fact, the UK has never derogated from Article 6 of the ECHR, even during the worst periods of the Troubles, and the most recent derogation from the ECHR in respect of Article 5 of the ECHR and the ATCS Act 2001 was withdrawn on the basis that its replacement, the non-derogating Control Order regime, would not require a derogation.

Even so, with counter-terrorist hybrid orders, the UK has been acting for several years now at the margins of permissible conduct under IHRL, and, as the courts have found, occasionally strayed beyond these margins. This has the effect of reducing the protections afforded to individuals under the fair trial guarantees usually associated with proceedings concerning serious alleged behaviour. In the context of the right to a fair trial, this is

particularly evident when counter-terrorist hybrid orders are implemented and administered by the courts as minimalistic safeguards are applied. Moreover, acting at the margins of permissible conduct has the simultaneous effect of avoiding the need to resort to the accommodation mechanisms possible under IHRL.[828] It is for these reasons that the UK could be said to be in a state of 'perpetual quasi-emergency',[829] which has in turn created the space necessary for the adverse effects upon the right to a fair trial to materialise.

Although the Control Order mechanism was established in response to the stalemate created by the Belmarsh case, in that foreign nationals who could not be deported or prosecuted could also no longer be indefinitely detained, the apparent justifications for counter-terrorist hybrid orders since then have clearly evolved as the majority of mechanisms are now actually imposed against British citizens. Moreover, since the *Chahal* decision in 1996, the need to provide procedural fairness to individuals in proceedings that carry national security concerns has continued to trouble the British Government. This chapter argues a number of factors have maintained the state of perpetual quasi-emergency since the *Chahal* and Belmarsh judgments. Crucially, the chapter asserts that the state of perpetual quasi-emergency could not be maintained by legal factors alone, as certain decisions of the courts have pushed back against the Government to reduce the harsh conditions attached to the mechanisms and, more importantly, to gradually improve the procedural fairness of proceedings. Equally important, the appointment of Special Advocates in relevant proceedings has undoubtedly improved procedural fairness to some extent.

[828] As Chapter 2 outlined, the constituent aspects of the right to a fair trial under Article 6 of the ECHR are not absolute. However, the only expressly qualified fair trial guarantee concerns the public nature of a trial.

[829] In this chapter, the terms 'perpetual quasi-emergency' and 'state of emergency' are used strictly in terms of IHRL but the concepts are closely related to other notions rooted in legal and political theory including 'permanent emergency' and 'states of exception'. See C. Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (Polity Press, 2013, translation by Michael Hoelzl and Graham Ward of the original text *Die Diktatur*: *von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf (1921)*) and *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press, 1985, translation by George Schwab of the original text *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (1922)); G. Agamben, *State of Exception* (University of Chicago Press, 2005); M. Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"' (2006) 31 *Alternatives* 191; Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency* (n. 59).

Accordingly, a number of extra-legal factors have helped to reinforce the state of perpetual quasi-emergency which has created the space necessary for the erosion of certain fair trial guarantees to take place.

As such, the purpose of this chapter is twofold. Firstly, the chapter explains how the state of perpetual quasi-emergency was established in the UK, and secondly, it critically analyses what legal and extra-legal factors may have contributed to its preservation. Following this Introduction, the second section briefly explores the notion of a 'prolonged emergency', of which the 'War on Terror' and the emergency paradigm more generally represent obvious manifestations. The core of the chapter then critically analyses how the state of perpetual quasi-emergency is preserved, drawing upon relevant legal and extra-legal factors. As such, the third section focusses upon the legal factors that have contributed to the preservation of the state of perpetual quasi-emergency before the fourth section explores what extra-legal factors may have also played a role. The fifth section considers what aspects of counter-terrorist hybrid orders are arguably being normalised in the domestic legal system, and the sixth section draws upon the chapter as a whole and concludes.

4.2 Establishing the State of Perpetual Quasi-Emergency in the UK

Before analysing the intricacies and implications of the perpetual quasi-emergency, it is first necessary to consider some notions that underpin the concept. The broad notion of a situation of permanent emergency raises obvious connotations with the dystopian world in George Orwell's *Nineteen Eighty-Four*.[830] Under the scrutiny of Big Brother, the citizens of super-state Oceania are brutally brainwashed into obedience through constant surveillance, fear and a belief fuelled by propaganda that a constant state of war exists between rival super-states. In the political manifesto of the orchestrated enemy of Oceania's citizens, Emmanuel Goldstein, the situation is described in the following terms:

[830] G. Orwell, *Nineteen Eighty-Four* (Penguin Books, 1989).

> It does not matter whether the war is actually happening, and, since no decisive victory is possible, it does not matter whether the war is going well or badly. All that is needed is that a state of war should exist.[831]

Furthermore, the fact that the particular super-state which Oceania was supposedly at war with often changed was inconsequential to the desired effect to permanently institutionalise total war and supress dissent.

The need for a 'state of war' in order to justify exceptional measures in the post-9/11 world sees a parallel in the seemingly perpetual emergencies under which citizens of several States endure. Although widely dismissed by legal scholars, the notion of the 'War on Terror' is the most obvious and significant manifestation of this analogy in the context of counter-terrorism.[832] The Orwellian notion of permanent war can be juxtaposed with President Bush's declaration after 9/11 that:

> Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.[833]

From a purely semantic perspective, President Bush's deeply hyperbolic and infinitely-scoped declaration of war which signalled a new era of counter-terrorism was loaded with analogies of religious struggle, notions of 'good' versus 'evil', and abstract ideals such as 'freedom' and 'justice'.[834] Specifically, President Bush claimed that 'enemies of freedom committed an act of war against our country' and that 'freedom itself is under attack'. However, the speech is most memorable for the assertion that the war would not end with Al

[831] ibid, 200.
[832] See Chapter 1, section 1.4.1, text accompanying ns. 43-46.
[833] President G. Bush, Address to a Joint Session of Congress and the American People (20 September 2001).
[834] For analysis of the initial rhetoric in the 'War on Terror', see Jackson, *Writing the War on Terrorism* (n. 43).

Qaeda, but rather, only when every terrorist group on the planet had been beaten.[835] Despite the apparent scaling back of the rhetoric of the 'War on Terror' under President Obama, similar rhetoric surfaced in France after the terrorist attacks in Paris in November 2015. Since the attacks, the then President Hollande stated that France was at war and referred to the attacks as acts of war on numerous occasions.[836]

Dealing with abstract notions however creates a whole raft of problems. As Thomas McDonnell helpfully reflected, 'we can claim we are fighting a war against poverty or drugs or ignorance, but we know deep down that when we use such language, we are really engaging in rhetorical hyperbole – exaggeration to make a point'.[837] A war on an abstract concept such as 'terrorism' is evidently of a completely different nature and scope to a war against a State. When fighting terrorists, generally speaking, we cannot witness the collapse of governments, the redrawing of borders or the signing of armistices. Wars are typically fought against 'proper nouns' for the reason that States can surrender, whereas wars against 'common nouns' such as drugs are less successful as opponents never surrender.[838] A war on an abstract concept, or a state of emergency which might have no conceivable end, clearly begs several fundamental questions, not least of all in relation to democratic desirability, political accountability and, most importantly, legality.

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[835] More war-like rhetoric and action followed. For example, a Military Order declared that non-American citizens would be 'detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals'. See President Bush, Military Order of November 13 2001 (n. 25). The first recorded missile strike from a Predator drone occurred on 3rd November 2002 in Yemen, despite there being no recognised armed conflict in, or against Yemen. Members of the Armed Forces who died on 9/11 rescuing trapped civilians were posthumously awarded medals. Deceased soldiers were awarded Purple Hearts, usually reserved for those who were injured or had died in battle, whilst the Defense of Freedom Medal was awarded to civilian personnel who had been killed. See US Department of Defense, Press Operations News Release, 'Defense of Freedom Medal Unveiled' (Release No: 463-01, 27 September 2001) at http://www.defense.gov/releases/release.aspx?releaseid=3068. In post-9/11 counter-terrorism military expeditions and operations, two medals were awarded to serving military service members. See President G. Bush, Executive Order 13289 of 12 March 2003, Establishing the Global War on Terrorism Medals, 14 March 2003.

[836] Président F. Hollande, Discours du président de la République devant le Parlement réuni en Congrès (Versailles, 16 Novembre 2015) at http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-devant-le-parlement-reuni-en-congres-3/.

[837] T. McDonnell, *The United States, International Law, and the Struggle Against Terrorism* (Routledge, 2011) 36.

[838] G. Byford, 'The Wrong War', *Foreign Affairs* (July-August 2002) 34.

However, any attempt to compare the behaviour of the UK with the USA in post-9/11 counter-terrorism is clearly a difficult and contentious undertaking. Whilst the UK's approach to the 'War on Terror' was mostly grounded in the rhetoric of law, rather than war,[839] which reinforced the primacy of criminal prosecution in disrupting terrorism,[840] this did not stop the UK taking drastic action in the immediate aftermath of 9/11.

As already mentioned, due to the implications of the ATCS Act 2001, the UK derogated from certain aspects of the right to liberty until the House of Lords declared that the measures were incompatible with the UK's human rights obligations.[841] Formally, the UK's derogation from Article 5 of the ECHR lasted from November 2001 until April 2005.[842] Running almost simultaneously, the UK's derogation from Article 9 of the ICCPR lasted from December 2001 until March 2005.[843] Nevertheless, as will be explored in more detail below, there remains a degree of uncertainty as to when, if at all, the British Government actually considered that the state of emergency which justified those measures had lapsed.

Although the formal state of emergency declared by the UK after 9/11 was far shorter in duration compared against the most serious prolonged emergencies in some States in the past century that have spanned several decades,[844] it would be a mistake to assign too much weight to matters of duration. It is equally, if not more important, to consider the extent

[839] See Chapter 1, section 1.1, text accompanying ns. 26-28 and ns. 35-38.
[840] See Chapter 1, section 1.1, text accompanying ns. 29-32.
[841] *A v. SSHD* (n. 33).
[842] See Chapter 3, section 3.2.2, text accompanying ns. 496-497.
[843] ibid.
[844] The HRC has criticised the prolonged states of emergency in Syria, Croatia, the Netherlands Antilles, Yemen, and Algeria. See Chapter 2, section 2.7.2, text accompanying ns. 438-442. Scholars have also commented on the prolonged emergencies in Egypt (S. Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 *New Criminal Law Review* 532); Ireland (A. Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1764); and Israel (A. Mizock, 'The Legality of the Fifty-Two Year State of Emergency in Israel' (2001) 7 *Davis Journal of International Law and Policy* 223). States of emergency in Northern Ireland and the USA have also caused concern. The state of emergency in USA since 9/11 arguably represents an example of a prolonged emergency. President Bush asserted that the emergency existed due to the attacks but also because of the 'continuing and immediate threat of further attacks on the United States'. See President G. Bush, Proclamation 7463: Declaration of National Emergency by Reason of Certain Terrorist Attacks, 14 September 2001 at http://www.presidency.ucsb.edu/ws/?pid=61760. This has been renewed every year to the present day.

of the actual measures that are adopted or made possible during the state of emergency. For example, the ECtHR in the Belmarsh case held that the ECHR had never incorporated the requirement that an emergency be temporary.[845] Rather, the ECtHR held that the jurisprudence concerning emergencies in Northern Ireland demonstrated that it was possible for a public emergency to continue for many years. The Court also rejected that derogations implemented 'in the immediate aftermath of the al-Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament' could be said to be 'invalid on the ground that they were not "temporary".'[846]

As explored in Chapter 2, both the ECHR and the ICCPR allow contracting States to derogate from certain aspects of their IHRL obligations in times of emergency.[847] When implemented in strict accordance with the legal requirements, the practice of a State derogating from its IHRL obligations has the potential to be relatively uncontroversial from a legal perspective, and indeed, represents a *prima facie* willingness to be transparent and abide by the rule of law. However, questions inevitably arise when emergencies and derogations become prolonged.[848]

Given the rhetoric from several governments that followed 9/11 which 'portrayed international terrorism as the ultimate security challenge',[849] it is somewhat surprising that the UK was the only State in the CoE to derogate immediately from its IHRL obligations. Having said that, the UK Government was particularly mindful of the presence of foreign nationals in the country who were engaged in terrorist activities, but whom could be neither

[845] *A v. UK* (n. 485) para 178.
[846] ibid.
[847] Art. 15 ECHR; Art. 4 ICCPR.
[848] See broadly IComJ, *States of Emergency — Their Impact on Human Rights* (n. 49); Oraá (n. 48); Marks (n. 48); Gross & Aoláin, *Law in Times of Crisis* (n. 50); Criddle & Fox-Decent (n. 48); V. V. Ramraj (ed) *Emergencies and the Limits of Legality* (CUP, 2008); Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency* (n. 59).
[849] C. Michaelsen, 'Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?' in Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency* (n. 59) 309.

deported nor prosecuted,[850] which the ECtHR acknowledged when granting a wide margin of appreciation to the UK Government.[851]

Although the UK's derogation from Article 5 of the ECHR formally lasted only until 2005, the behaviour of the UK since then strongly resembles the behaviour of States enduring a 'prolonged emergency'. In that regard, the IComJ produced a seminal and comprehensive report in 2009 in which they suggested that:

> A prolonged emergency is characterised by the assumption of greater executive powers, legal frameworks that create an environment prone to human rights violations […], limitations on accountability mechanisms, and eventually a detrimental effect on the wider criminal justice system.[852]

Bearing in mind the focus of this study, all four characteristics are palpable to some extent in the UK, insofar as the design, implementation and administration of counter-terrorist hybrid orders are concerned. Inevitably, the extraordinarily broad definitions of the key terminology that underpins counter-terrorist hybrid orders represents an overarching concern and impacts upon all four characteristics. In particular, the definition of 'terrorism' grants the executive an extremely broad room to manoeuvre pursuant to the aim of protecting national security, which will be explored in more detail later.[853]

Regarding the first characteristic, namely, the assumption of greater executive powers, the Home Secretary's broad power to impose counter-terrorist hybrid orders upon individuals comes with very limited judicial supervision and clearly represents a significant growth in executive power in the field of counter-terrorism. This is particularly evident by the fact that Control Orders could be imposed on the basis of 'reasonable suspicion',[854] that TPIMs could initially be imposed on the basis of 'reasonable belief' (and now the 'balance of

[850] Human Rights Act 1998 (Designated Derogation) Order 2001 (n. 497) 2.
[851] *A v. UK* (n. 485) para 180.
[852] IComJ, 'Assessing Damage, Urging Action' (n. 44) 40.
[853] See below, section 4.3.1.
[854] PTA 2005, s. 2(1)(a).

probabilities'),[855] and that TEOs can be imposed on the basis of 'reasonable suspicion'.[856] Moreover, regarding the use of CMP in court proceedings, the executive benefits from clear advantages over an individual subjected to the relevant mechanism, insofar as the individual can be excluded from trial and can be given limited disclosure of the evidence or final judgment.

On the second characteristic, namely, the creation of legal frameworks that create an environment prone to human rights violations, although the courts have been clear that the mechanisms do not systematically, in and of themselves, violate the right to liberty or fair trial guarantees, they nevertheless place huge restrictions upon the human rights of subjects and have at times been found to violate Article 5 and 6 of the ECHR.[857] In regard to the right to a fair trial, the use of CMP, which has become ubiquitous in trials involving national security concerns, unquestionably places individuals at a massive disadvantage vis-à-vis the State. As discussed earlier, this legal framework has been controversial from the outset.[858]

Regarding the third characteristic, namely, the limitations on accountability mechanisms, the predominant emphasis upon national security makes it extremely difficult to effectively challenge the actions, allegations and evidence of the executive, or to even comprehend how often such powers are used. This is evident in the manner that counter-terrorist hybrid orders are implemented and reviewed in the courts, or in proceedings involving secret evidence more generally. For example, the fact that Special Advocates cannot communicate with individuals without approval once they have been served with the closed evidence makes it extremely difficult to cross-examine crucial evidence provided by the Security Service.

Finally, regarding the fourth characteristic, namely the detrimental effect on the wider criminal justice system, the fact that counter-terrorist hybrid orders are deliberately

[855] TPIM Act 2011, s. 3(1) as amended by CTS Act 2015, s. 20(1).
[856] CTS Act 2015, s. 2(3).
[857] See in particular *SSHD v. JJ* (n. 655); *SSHD v. MB and AF* (n. 655); *SSHD v. AF (No. 3)* (n. 655).
[858] See Chapter 3, section 3.4.2.

administered in the civil law illustrates how the criminal law is bypassed altogether, save for the possibility of imposing criminal sanctions for any breach of a condition. In other words, the emergence of a parallel justice system may represent a significantly detrimental effect upon the criminal justice system. Moreover, as will be looked at later, the extension of CMP into other areas of law and the gradual normalisation of the exceptional has shown how the criminal justice system may be neglected whenever national security concerns arise.[859]

4.3 Legal Factors Preserving the Perpetual Quasi-Emergency

As already mentioned, the legal developments between 1996 and 2004 created a legal impasse in which the UK had to decide how to treat foreign terrorist suspects who could be neither deported or prosecuted, nor no longer indefinitely detained. Moreover, since the *Chahal* judgment in 1996, the British Government has had to persistently grapple with the issue of providing adequate levels of procedural fairness in court proceedings that carry national security concerns. The impasse established by the Belmarsh judgment in 2004, with the implications of the *Chahal* judgment overshadowing it, led to the creation of the first counter-terrorist hybrid order that this thesis focusses on, the Control Order.

Although Control Orders were initially imposed against the 10 foreign nationals who had previously been detained under the ATCS Act 2001, the imposition of the mechanisms against British citizens gradually became more commonplace. Ultimately, of the 52 Control Orders imposed over the course of the PTA 2005, 24 were against British citizens and 28 were against foreign nationals.[860] Moreover, the vast majority of TPIMs have been imposed

[859] See below, section 4.5.
[860] Anderson, 'Control Orders in 2011' (n. 6) para 3.14.

against British citizens,[861] whilst TEOs can only be imposed against individuals with the right to live in the UK, which obviously includes British citizens.[862]

As such, the justifications for counter-terrorist hybrid orders have clearly developed and evolved since the initial introduction of Control Orders under the PTA 2005 in the aftermath of the Belmarsh case. Rather, since the creation of the Control Order regime, the state of perpetual quasi-emergency has been preserved in part by a variety of additional legal and extra-legal factors.

The legal factors which have helped to preserve the state of perpetual quasi-emergency are inextricably linked and ultimately culminate to provide the executive the opportunity to operate at the boundaries of permissible conduct under IHRL. First and foremost, the definition of key terminology underpinning the counter-terrorist hybrid order statutory regimes raises concerns that are familiar with counter-terrorist legislation; that is, that the legislation encompasses broad definitions and grants extensive discretionary powers to the executive. Secondly, when counter-terrorist hybrid orders are reviewed or challenged in the courts, some have criticised the deference of the judiciary to the executive in light of the inherent national security issues at stake. However, as will be discussed, the courts have had some significant impact insofar as the frameworks of the mechanisms are concerned.

4.3.1 Definition 'Creep' in Counter-Terrorist Legislation

Although a thorough examination of the challenges emanating from the definition of terrorism in British counter-terrorist legislation is clearly beyond the scope of this thesis,[863] a more

[861] Of the 10 TPIMs imposed by March 2015, only one was against a foreign national. See Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) para 2.3. More recent statistics reveal that the majority of TPIMs are imposed against British citizens. See Chapter 3, section 3.3.2, text accompanying ns. 586-588.
[862] CTS Act 2015, s. 2(6).
[863] The pursuit of a satisfactory definition of terrorism has dogged legal scholars for decades both home and abroad. See for example, C. Walker, 'The Legal Definition of "Terrorism" in United Kingdom Law and Beyond' (2007) PL 331; B. Saul, *Defining Terrorism in International Law* (OUP, 2008); B. Golder & G. Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 *University of NSW Law Journal* 270; G. Fletcher, 'The Indefinable Concept of Terrorism' (2006) 4 *Journal of International Criminal Justice* 894.

focussed analysis in the context of counter-terrorist hybrid orders is warranted. This is because the definition of 'terrorism' for the purposes of the statutory regimes underpinning the mechanisms is the definition of terrorism contained within the Terrorism Act (TA) 2000.[864] In other words, the restrictions and obligations which can be imposed upon individuals as a result of a counter-terrorist hybrid order are done so on the basis of that individual's suspected involvement in terrorism, as defined under the TA 2000. Moreover, the fact that counter-terrorist hybrid orders can be imposed on the basis of suspected 'terrorism-related activity' adds a further layer of complexity by extending the chain of individuals who could be subjected to the mechanisms.

In this regard, the UK is well noted for having one of the broadest definitions of terrorism in the world which has presented an unprecedented level of definition 'creep' since the turn of the millennium.[865] The former IRTL, David Anderson, has noted a theoretical example of an individual who could be deemed a terrorist under current legislation, demonstrating the breadth of the definition and, in particular, the relatively weak notion of 'influencing' a government which forms the 'target' element of the definition. Anderson alludes to a campaigner who voices a religious objection to vaccination, suggesting that if that campaigner tries to influence a government against vaccinations, and their words are deemed capable of causing a serious risk to public health, they could be considered a

[864] PTA 2005, s. 15(1); TPIM Act 2011, s. 30(1); CTS Act 2015, s. 14(2). In essence, the definition of terrorism contained within s. 1 of the Terrorism Act 2000 involves three cumulative elements: (a) the actions or threats of actions e.g. Serious violence against a person; (b) the target of those actions i.e. to influence a government or international organisation, or to intimidate the public; (c) the motive of those actions i.e. advancing a political, religious, racial or ideological cause. See D. Anderson, 'The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (July 2014) para 10.6; A. Greene, 'Defining Terrorism: One Size Fits All?' (2017) 66 *International and Comparative Law Quarterly* 411.

[865] D. Anderson, 'The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (Press Release, July 2014) 1. Helen Fenwick has argued that the definition is 'immensely broad and imprecise'. See Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001' (n. 495) 734. See also *R v. Gul* [2013] UKSC 64 in which the Supreme Court held in *obiter dictum* that a review and reform of the definition of terrorism was warranted.

terrorist.[866] Even more concerning, anyone who encouraged or otherwise supported the campaigner could also fall foul of the relevant ancillary or preparatory terrorist offences.[867]

However, the notion of 'terrorism-related activity' under the various statutory counter-terrorist hybrid order regimes presents further difficulties. For the purposes of Control Orders, the PTA 2005 defined 'terrorism-related activity' as four types of conduct. The first type of conduct was uncontroversial and concerned 'the commission, preparation or instigation of acts of terrorism'.[868] More questionable were the second and third types of activities that concerned 'conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so', and 'conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so'.[869] However, the fourth type of conduct was incredibly broad, and created a potentially infinite chain of causation. This concerned conduct 'which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity'.[870]

For the purposes of imposing a TPIM, the TPIM Act 2010 defines the first three types of 'terrorism-related activity' in identical ways to the PTA 2005 outlined above.[871] However, the fourth type of conduct is less broad than its equivalent under the PTA 2005, and concerns that 'which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraph (a)'.[872] In other words,

[866] Anderson, 'The Terrorism Acts in 2013' (n. 864) para 4.19.
[867] ibid.
[868] PTA 2005, s. 1(9)(a).
[869] ss. 1(9)(b)-(c).
[870] s. 1(9)(d).
[871] TPIM Act 2011, ss. 4(1)(a)-(c).
[872] s. 4(1)(d). Under the TPIM Act before its amendment, the fourth type of conduct was much broader and included that 'which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraphs (a) to (c)'. Section 20(2) of the CTS Act 2015 removed (b) and (c) from the clause. The IRTL criticised the scope of 'terrorism-related activity' in the original TPIM Act before its amendment, suggesting that this extended the already very broad concept of terrorism. The Reviewer gave the example of a family member who supports someone who encourages someone else to prepare an act of terrorism, and suggested that the concept of 'terrorism-related activity' potentially implicated people whose association with terrorism 'is at two removes (e.g. A who supports B who encourages C, when it is only C who is involved in the commission, preparation or instigation of an act of terrorism)'. See Anderson, 'The Terrorism Acts in

assuming the other requirements to impose a TPIM under section 3 of the TPIM Act are also met, an individual can be subjected to a TPIM if they support or assist another individual who the first individual knows or believes is involved in 'the commission, preparation or instigation of acts of terrorism'. Finally, for the purposes of TEOs, the CTS Act 2015 defines 'terrorism-related activity' in identical ways to the current TPIM regime.[873]

However, the definitions of 'terrorism' and 'terrorism-related activity' are not the only terms underpinning counter-terrorist hybrid orders that raise concerns. As alluded to already, the requirement for the Home Secretary to have a 'reasonable suspicion',[874] 'reasonable belief',[875] or, to be 'satisfied, on the balance of probabilities',[876] that the individual has been involved in 'terrorism-related activity', are all much lower thresholds than the familiar criminal standard of 'beyond all reasonable doubt'. When one considers the limited role of the courts in the first place, the discretion afforded to the SSHD is extraordinarily broad. In this regard, the breadth of Ministerial discretion in the implementation of counter-terrorist hybrid orders may warrant a comparison with the prosecutorial discretion afforded to the executive in regards to alleged terrorist criminal offences. In *R v. Gul*, which concerned an individual prosecuted for disseminating terrorist publications, the Supreme Court rejected the notion that a statutory prosecutorial discretion mitigated the width of the definition of terrorism in section 1(1) of the TA 2000, holding that it was not 'an appropriate reason for giving "terrorism" a wide meaning'.[877]

Due to the definitions of some of the fundamental terms contained within the statutory regimes of counter-terrorist hybrid orders, the measures envisaged can be imposed upon individuals on the basis of a vast array of alleged conduct, and on the basis of a very low

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2013' (Press Release) (n. 865) 3; Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) para 3.1(e).

[873] CTS Act 2015, s. 14(4).

[874] This was the threshold required to impose a Control Order under s. (2)(1)(a) PTA 2005, and the current threshold required to impose a TEO under s. 2(3) CTS Act 2015.

[875] This was the threshold originally required to impose a TPIM under s. 3(1) TPIM Act 2011.

[876] This is the threshold currently required to impose a TPIM under s. 3(1) TPIM Act 2011, as amended by s. 20(1) CTS Act 2015.

[877] *R v. Gul* [2013] UKSC 64, para 40. See A. Greene, 'The Quest for a Satisfactory Definition of Terrorism: *R v Gul*' (2014) 77 MLR 780.

threshold of proof that the individual is involved in that conduct. This arguably represents a significant expansion of executive power, one of the characteristics of States enduring a prolonged emergency as defined by the IComJ. Taking these factors together, serious questions arise over the role and effectiveness of the courts in the implementation and oversight of the mechanisms.

4.3.2 Judicial Deference to the Executive in Matters of National Security

Of the factors contributing to the preservation of the state of perpetual quasi-emergency, the approach of the judiciary to the executive over matters of national security is worthy of particular attention as the issue of judicial deference has provoked debate in the UK long before 9/11 and the creation of the mechanisms that this thesis examines. The issue has been particularly exposed in the context of domestic terrorism in Northern Ireland. For example, as noted by Clive Walker, 'there is a long history of judicial deference to challenges to national security restrictions on organisations'.[878] In other cases concerning matters of national security the domestic courts have often declined to challenge the executive, for example, when faced with judicial review claims in respect of exclusion orders during the Troubles,[879] and the deportation of aliens.[880]

Owing to the prevalence of judicial deference to the executive in cases concerning national security, some have criticised the judiciary for being overly deferential at times.[881] In that respect, Lucia Zedner has suggested that there are five conceivable reasons why the judiciary are deferential to the executive: decisions relating to security are expert matters in which judges are not expert; decisions relating to security are political matters requiring accountability through Parliament; it is for the executive to make controversial decisions

[878] Walker, *Terrorism and the Law* (n. 78) 354. See *McEldowney v. Forde* [1971] AC 632, [1969] 2 All ER 1039; *Re: Williamson's Application for Judicial Review* [2000] NI 281.
[879] *R v. Secretary of State for Home Affairs ex parte Stitt* (1987) *The Times* 3 February (QBD); *R v. SSHD ex parte McQuillan* [1995] 4 All ER 400; *R v. SSHD ex parte Adams (No. 1)* [1995] All ER (EC) 177.
[880] See *R v. SSHD ex parte Cheblak* [1991] 1 WLR 890, [1991] 2 All ER 319.
[881] Gross & Aoláin, 'From Discretion to Scrutiny' (n. 52) 640; de Londras (n. 46) 217-218; Fenwick & Phillipson, 'Covert Derogations and Judicial Deference (n. 52) 872.

regarding security; that the courts' function as a check on legislative action ought to be diminished in times of crisis; and finally, the courts may actually be persuaded of the need to protect the public.[882]

As risk-aversion policies are advanced in the name of national security, which indefinite detention and counter-terrorist hybrid orders undoubtedly represent, it is perhaps inevitable that the executive would defend such policies by arguing that the judiciary should defer to its judgment over matters of national security. The submissions made by the Government during the Belmarsh case were strongly of that persuasion:

> [A]s it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters...calling for an exercise of political and not judicial judgment.[883]

Beginning with the Belmarsh case, as already discussed, the House of Lords ruled against the Government and issued a declaration of incompatibility in respect of the indefinite detention regime. This was a significant moment, ultimately leading to the creation of the Control Order regime as a means to solve the legal impasse created by the judgment. Having said that, the majority of the House of Lords did not challenge the British Government's declaration of a state of emergency under Article 15 of the ECHR.[884]

In this regard, the performance of judges in common law countries standing up the executive on matters of national security has been described by some as 'decidedly patchy',[885] and by another as 'at worst dismal, at best ambiguous'.[886] For example, in *SSHD v. Rehman*, Lord Hoffmann's postscript comments represent what might be considered the most extreme end of the deferential spectrum:

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[882] Zedner, 'Securing Liberty in the Face of Terror' (n. 68) 526-527.
[883] *A v. SSHD* (n. 33) para 37.
[884] ibid. See also Hickman (n. 497).
[885] Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52) 915.
[886] Dyzenhaus, *The Constitution of Law* (n. 52) 17.

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[887]

In the context of emergencies, as Chapter 2 analysed, the ECtHR will generally not challenge a State's declaration of a state of emergency and has nearly always deferred to States on this issue. Rather, the ECtHR has stressed that it will limit its scrutiny to the issue of whether States have acted within the exigencies of the situation.[888]

However, in the Belmarsh case before the Court of Appeal, Brooke LJ was particularly deferential to the Government on these matters:

> [T]he judiciary must be willing…to put an appropriate degree of trust in the willingness and capacity of ministers and Parliament, who are publicly accountable for their decisions, to satisfy themselves about the integrity and professionalism of the Security Service. If the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry up if

[887] *SSHD v. Rehman* [2001] UKHL 47, para 62.
[888] See Chapter 2, section 2.7.3.

> sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further.[889]

The alternative, according to Brooke LJ, would involve a 'purist approach' which entailed the belief 'that it is better that this country should be destroyed, together with the ideals it stands for, than that a single suspected terrorist should be detained without due process'.[890]

Offering the lead judgment in the Belmarsh case before the House of Lords, Lord Bingham encapsulated the deferential nature of the judiciary in matters of national security and held:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum.[891]

However, ruling alone on this fundamental point, Lord Hoffmann offered a separate judgment which stands at odds somewhat with his earlier postscript comment in *Rehman* discussed above. The core of Lord Hoffmann's opinion focussed on whether or not indefinite detention could be justified on the grounds that a war or other public emergency threatening the life of the nation existed in the UK.[892] He discussed the notable and historical examples of the Napoleonic Wars and the World Wars of the twentieth century in which habeas corpus

[889] *A and others v. SSHD* [2002] EWCA Civ 1502, [2004] QB 335, para 87.
[890] ibid.
[891] *A v. SSHD* (n. 33) para 29.
[892] ibid, para 88.

was suspended and far-ranging detention powers were granted to Government.[893] Crucially, Lord Hoffmann held that a public emergency did not exist in the aftermath of 9/11 which led to the subsequent British legislation. He dismissed the argument that terrorism threatened the life of the nation:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.[894]

The defining and most memorable passage of Lord Hoffmann's speech came at his conclusion, when he held:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[895]

Subsequently, at the ECtHR, the Grand Chamber agreed with the majority of the House of Lords that a public emergency existed. After recounting its prior decisions in *Lawless*, *The*

[893] ibid, para 89.
[894] ibid, para 96.
[895] ibid, para 97. Lord Hoffmann's judgment is somewhat puzzling when contrasted with his opinion in an earlier case concerning national security, *SSHD v. Rehman* (n. 887). In that case, Lord Hoffmann went as far as saying that 'decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive' (para 50).

Greek Case, *Ireland v. UK*, *Brannigan and McBride v. UK*, *Marshall v. UK*, and *Aksoy*, the Court delivered some useful additional comments. The Grand Chamber stated:

> The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real. Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation.[896]

Additionally, the Grand Chamber discussed the problematic aspect of the duration of public emergencies. The Court noted that prior case law had never previously 'incorporated the requirement [emanating from the HRC] that the emergency be temporary'.[897] Quite to the contrary, the Court stated that with particular regard to the Northern Ireland situation, it was possible for a public emergency 'to continue for many years'.[898] The Court then proceeded to reject Lord Hoffmann's strong assertion that there had to exist a threat to the institutions of government or the existence as a civil community, for a public emergency to occur. Rather, the Court acknowledged that it had 'in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman'.[899] Ultimately, despite noting the fact that the UK was the only contracting State to lodge a derogation, the Grand Chamber confirmed that the national authorities, as the guardians of their own people's safety, were to enjoy a wide margin of

[896] *A v. UK* (n. 485) para 177.
[897] ibid, para 178.
[898] ibid.
[899] ibid, para 179.

appreciation. Consequently, the Court agreed with the majority of the House of Lords that there did exist a public emergency threatening the life of the nation.

Insofar as the counter-terrorist hybrid order frameworks are concerned, the domestic courts have undoubtedly had a significant impact and improved their fairness to some extent. Initially however, the lower domestic courts remained considerably more hands-off than the previous 'episodes' of judicial review in the UK in cases concerning national security.[900]

As alluded to already, as the role of the courts is merely to test if the decisions of the SSHD are 'obviously flawed', immediate doubts can be cast upon the ability of the courts to subject the mechanisms to more meaningful scrutiny and oversight.[901] During the earliest years of the Control Order regime, the lower courts were 'extremely cautious' when tackling the issue of disclosure, 'allowing the Home Secretary to refuse to disclose simply because there were national security concerns about the type and source of the material in general'.[902]

Moreover, when *MB*'s appeal was heard before the Court of Appeal, Lord Phillips appeared to adopt a deferential stance, holding that the SSHD is 'better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect'.[903] It was for this reason, according to Lord Phillips, that 'a degree of deference must be paid to the decisions taken by the Secretary of State' which had long been recognised as appropriate in matters relating to state secrecy.[904] Having said that, Lord Phillips acknowledged that there was 'scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it

[900] A. Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' (2010) 126 LQR 543. Tomkins argues that the first episode was in the 20th century and the second episode was the landmark Belmarsh case. See also N. Guruli, '"A Justifiable Self-Preference"? Judicial Deference in Post-9/11 Control Order and Enemy Combatant Detention Jurisprudence' (2014) 3 *Cambridge Journal of International and Comparative Law* 884.
[901] PTA 2005, s. 3(2)(a); TPIM Act 2011, s. 6(3)(a); CTS Act 2015, s. 3(2).
[902] B. Hale, 'Terrorism and Global Security: Threats to the Independence of the Judiciary in a Changing World', Speech at the 10th Biennial International Conference of International Association of Women Judges, Seoul, South Korea (12 May 2010) at https://www.supremecourt.uk/docs/speech_100512.pdf 8.
[903] *SSHD v. MB* [2006] EWCA Civ 1140, [2007] QB 415, para 64.
[904] ibid.

must do so'.[905] Closely related to this, as already discussed in depth, the courts have consistently agreed with the Government that proceedings concerning counter-terrorist hybrid orders do not involve the determination of a criminal charge, and do not therefore invoke the criminal limb of the right to a fair trial.

Secondly, the judgment in *AF (No. 3)*, and in particular the required level of disclosure, was one that several Law Lords did not want to make, and may even have been rather different had the House of Lords not had the legal obligation under the HRA 1998 to take the ECtHR's decision in *A v. UK* into account.[906] In this regard, Fenwick and Phillipson have argued that 'the fact it took an international court to show the UK's highest court the way is an eloquent and sobering illustration of the dangers of excessive judicial deference'.[907] Fenwick and Phillipson have been equally damning of the overall judicial approach to the earliest Control Order cases, arguing that the 'overuse of judicial deference to the executive or Parliament can have wider, damaging constitutional implications' which distorted 'both the reasoning and outcome in some of the key control order cases'.[908]

The approach of the judiciary in the administration of Control Orders was also criticised by Baroness Hale, who, towards the end of the life of the Control Order regime in 2010, suggested that it was worrying that 'the courts have so far adopted such a restricted view of their powers to challenge the Home Secretary's claims to secrecy'.[909] Going further, Hale queried:

> Can it be right to allow less fair procedures for imposing preventive measures on the ground of reasonable suspicion than it is for imposing punishment for proven wrong-doing if the result is the same – a long time

[905] ibid, para 65.
[906] HRA 1998, s. 2(1)(a). See Chapter 3, section 3.5.1, text accompanying ns. 781-784.
[907] H. Fenwick & G. Phillipson 'UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms' in V. Ramraj et al, *Global Anti-Terrorism Law and Policy* (CUP, 2014) 493.
[908] Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52) 872.
[909] Hale (n. 902) 9.

> behind bars or confined to the home? How far can the judiciary lend itself to modifications of the traditional notion of a fair trial in order to prosecute terrorists to conviction?[910]

Former Law Lord Johan Steyn has similarly suggested that despite the judiciary being 'charged with the duty of standing between the government and individuals', judges 'are often too deferential to the executive in times of peace'.[911] Indeed, the courts might lack sensitive information which the Security Service has attained. This 'information poverty' as Michael Haile describes it, might make a judge unwilling to 'risk their credibility' and thus defer to the executive, rather than 'risk a wrong decision that may put the nation in danger'.[912] Alternatively, as discussed in Chapter 2, 'by leaving to the state the primary determination if there is a public emergency the Court is clearly deferring to the sovereignty of the state'.[913]

Whilst the domestic courts have almost always deferred to the executive over the existence of an emergency and have, at times, appeared reluctant to challenge the executive over the substantial fairness of the counter-terrorist hybrid order regimes, the higher courts have nevertheless helped to shape the regimes as they currently exist and improve their procedural fairness. In particular, the House of Lords had a significant impact over the substantial and procedural fairness of the earliest Control Orders, not least of all in *MB and AF* and *AF (No. 3)*, and these judgments have continued to shape subsequent counter-terrorist hybrid orders.[914]

Moreover, in *SSHD v. AP* which was one of the last Control Order cases, the Supreme Court held that a 16 hour curfew and the relocation of the individual 150 miles from his home

[910] ibid.
[911] Steyn (n. 44) 1.
[912] Haile (n. 52) 25-26.
[913] Burchill (n. 61) 103.
[914] See Chapter 3, section 3.4.1, text accompanying ns. 655-671.

violated Article 5 of the ECHR.[915] Seemingly at odds with his opinion in *SSHD v. JJ*, Lord Brown held that there was not a simple cut-off point for a curfew to be acceptable. Rather, Lord Brown held that 'for a Control Order with a 16-hour curfew (*a fortiori* one with a 14-hour curfew) to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living'.[916]

Whether due to the enormous flexibility granted to the executive, which limits the role of the courts, or the occasional reluctance of the courts to challenge the executive on matters of national security, the courts have undoubtedly played a part in shaping the various counter-terrorist hybrid order regimes. Nevertheless, during the earliest years of the Control Order regime in the lower courts, the lack of meaningful scrutiny shown towards the decisions of the executive reveals a troubling lack of accountability, demonstrating the third characteristic of a prolonged emergency to some extent.

4.4 Extra-Legal Factors Preserving the Perpetual Quasi-Emergency

As already mentioned, this chapter argues that the various legal factors explored are, despite being significant in their own right, unable to preserve the state of perpetual quasi-emergency alone, due to two significant factors. Firstly, the courts have marginally improved the fairness of proceedings by, *inter alia*, requiring a minimum level of disclosure, and secondly, the statutory regimes have provided for the appointment of Special Advocates in relevant proceedings. These developments contrast significantly with the generally deferential nature of the courts to the executive over matters of national security, and the consistent position that proceedings concerning counter-terrorist hybrid orders invoke the civil limb of the right to a fair trial, rather than the more stringent criminal limb. As such, it

[915] *SSHD v. AP* (n. 660).
[916] ibid, para 4.

may be argued that a number of closely related extra-legal factors reinforce these legal factors to preserve the state of perpetual quasi-emergency.

Firstly, as the Literature Review in Chapter 1 illustrated, contemporary political, philosophical and legal discussion which has addressed the issue of diminishing human rights standards in the face of national security concerns has focussed on the metaphor of striking a balance between liberty and security. Although this line of thought has some role to play in contemporary debate about counter-terrorism measures and civil liberties, a more critical analysis of the metaphor reveals that such an approach may be disingenuous and overly simplistic. Secondly, the rhetoric of panic, threat and fear, which often accompanies any discussion of counter-terrorist law and policy, remains an overwhelming concern when matters of national security arise in parliamentary debates. This is all too familiar during the legislative processes of counter-terrorism policy and in society more broadly, although little legal research has evidenced this.

4.4.1 The Metaphor of 'Balance' between Liberty and Security

In the aftermath of acts of terrorism or in the face of future terrorist threats, counter-terrorist policy and law that purports to bolster security has the obvious potential to threaten the civil liberties of suspected wrongdoers and law-abiding citizens alike. As mentioned earlier, one of the most prevalent themes of discussion amongst political, philosophical and legal commentators has concerned the alleged conflicts between the dual imperatives of security and liberty. Moreover, it is difficult to reject the argument that the debate has been dominated by the metaphor of balance between the two notions.[917] Few have seriously attempted to ascertain what fundamental root causes or factors may have contributed to the erosion of fair trial guarantees, or human rights more broadly, in post-9/11 UK counter-terrorism legislation. Such discussion has generally been confined to more theoretical

[917] For academic commentary, see Chapter 1, section 1.4.2, text accompanying ns. 65-71.

disciplines such as political science, politics and philosophy. However, when probing the metaphor, a number of contradictions and fallacies are exposed.

In Jeremy Waldron's classic article on the balancing metaphor, one of the reasons the author contended the balancing metaphor must be subjected to scrutiny centred on the 'difficulties with distribution'.[918] Waldron argued that although we may frame the debate as pitching our liberties against our security, we need to be aware that the reduction in liberty may affect some people more than others. In other words, any changes that may be implemented could in truth equate to 'a proposal to trade off the liberties of a few against the security of the majority'.[919]

Building on from this argument, David Luban has contended that eight fallacies taint the debate over liberty and security, with the first fallacy meriting particular attention. Luban labels the first fallacy the 'Mel Brooks Fallacy', in testament to the comedian's quip that 'Tragedy is when I cut my *finger*. Comedy is when you fall into an open sewer and die'.[920] In essence, Luban argues that this poignantly describes the implicit assumption that proponents of the 'trade-off' thesis make, which involves the trade-off of rights belonging to other people, often minorities or foreigners, against one's own security.[921] According to Luban, the debate about liberty and security trade-offs 'becomes genuine only when we pose the question in its legitimate form: how many of your own rights are you willing to sacrifice for added security?'[922] Even this is problematic, as Luban admits. The author acknowledges that being a 'respectable, middle-aged, native-born, white, tenured professor', it is highly unlikely he would 'ever need to invoke the right against self-incrimination or the

[918] Waldron (n. 68) 194.
[919] ibid.
[920] Luban, 'Eight Fallacies About Liberty and Security' (n. 71) 243-246 in reference to M. Brooks & C. Reiner, '2000 Year Old Man'.
[921] David Cole has suggested that after 9/11 the USA followed 'a disturbing historical pattern, in which we, the citizenry, sacrifice not our freedoms but the freedoms of noncitizens, a minority group with no vote, in the interest of preserving citizens' security…Once again, we are treating people as suspicious not for their conduct, but based on their racial, ethnic, or political identity'. See D. Cole, 'Their Liberties, Our Security: Democracy and Double Standards' (2003) 31 *International Journal of Legal Information* 290, at 310.
[922] Luban, 'Eight Fallacies About Liberty and Security' (n. 71) 243.

right to a speedy, public trial'.[923] Accordingly, this realisation causes Luban to undervalue these rights and brand them as Other People's rights (OPR).[924] In a similar manner, Geoffrey Stone has contended that 'the individuals whose rights are sacrificed are not those who make the laws, but minorities, dissidents, and noncitizens. In those circumstances, "we" are making a decision to sacrifice "their" rights' which, according to Stone, is 'not a very prudent way to balance the competing interests'.[925] Slightly diverging from the emphasis upon foreign citizens or ethnic minorities, is what Eric Posner and Adrian Vermeule term 'democratic failure theory'.[926] According to Posner and Vermeule, 'rational and well-motivated governments will provide more security as threats increase' which may involve wholly or partially externalising 'the costs of security onto non-voters or other politically unrepresented groups'.[927]

In that regard, it is important to recall that of the 52 Control Orders imposed, all were imposed against men suspected of Islamist extremism,[928] whilst the first 10 TPIMs were also imposed against men suspect of Islamist extremism.[929] Equally, due to the fact that TEOs were created in response to the threat of potential jihadists returning to the UK from Syria and Iraq, there is little doubt that the subjects of these mechanisms will also be individuals suspected of Islamist extremism.

However, indicating that exceptional measures can become the norm, it might be contended that laws that appear to target specific categories of people actually come to affect the public at large. This is made possible in two ways. Firstly, Martin Scheinin has argued that the trickle-down nature of counter-terrorism legislation can be thought of with regard to a pyramid metaphor, in the sense that draconian laws aimed at a very select few (potentially)

[923] ibid.
[924] ibid. See also R. Dworkin, 'Terror and the Attack on Civil Liberties' (2003) 50 *The New York Review of Books* 1.
[925] G. R. Stone, *Perilous Times: Free Speech in Wartime – from the Sedition Act of 1798 to the War on Terrorism* (W. W. Norton & Company, 2005) 531.
[926] E. A. Posner & A. Vermeule, 'Emergencies and Democratic Failure' (2006) 92 *Virginia Law Review* 1091.
[927] ibid, 1092.
[928] Anderson, 'Control Orders in 2011' (n. 6) para 1.1.
[929] Anderson, 'Terrorism Prevention and Investigation Measures in 2012' (n. 553) para 4.8.

harmful individuals can actually impact the public.[930] Specifically, counter-terrorism laws may be implemented in which a tiny number of suspected or genuine terrorists suffer serious human rights violations, whilst the majority of average law-abiding citizens at the bottom of the pyramid may face (in comparison) minor interferences with their human rights. Scheinin gives the example of the right to privacy in which new rules on the interception of communications, databases and data retention affect everyone. In this sense, it might be contended that the OPR thesis deceives the public into believing that only a minority are affected by draconian legislation whilst in fact human rights guarantees for the wider public are adversely affected.

Secondly, as Daniel Moeckli contends, 'exceptional law and law enforcement practices…have significant implications beyond the anti-terrorism context: they have a tendency to transgress their original temporal, spatial, and communal boundaries and to find their way into states' ordinary legal systems'.[931] This closely overlaps and builds upon the more general argument that times of crisis or emergency provide the perfect environment for a security-minded executive to enact harsh counter-terrorism legislation. Going further, the public might be more willing to accept the erosion of human rights guarantees in times of emergency, which may target a tiny minority of people, before these restrictions become entrenched or even expanded to encroach upon the rights of the public. In other words, what were originally measures affecting a tiny minority of the population may become expanded to affect the public more widely. In effect, the exceptional situation creates space for harsh legislation to filter into the ordinary criminal or civil justice systems.

As is often shown in matters of national security or public order, laws that carry broad definitions or otherwise grant a broad discretion to those charged with implementation risk being viewed as arbitrary or discriminatory when they are applied. The seemingly disproportionate use of certain police powers in the context of national security and public

[930] M. Scheinin, 'Terrorism' in D. Moeckli, S. Shah & S. Sivakumaran (eds) *International Human Rights Law* (OUP, 2nd ed, 2014) 557.
[931] Moeckli (n. 68) 232.

order against ethnic minorities can be easily identified in the UK. For example, black and Asian people continue to be disproportionately subjected to stop and search police powers.[932] With regards to the use of temporary detention at international terminals pursuant to Schedule 7 of the TA 2000, Asian people accounted for 28% of all examinations lasting under one hour in the 2015-16 reporting year, rising to 36% of all examinations lasting over an hour.[933]

A further observation which may help to explain why the right to a fair trial is being eroded, or for that matter why respect for human rights more broadly may be waning, concerns what we actually mean by the concept of security itself. Whereas the OPR thesis concerns the question of *whose* security is being protected and *whose* liberty is being restricted, Conor Gearty argues that the term 'security' itself has been historically focussed on national security and ensuring the protection of the State from external and internal threats.[934] In other words, the very concept of security is not about human security, as the debate about balancing liberty and security may imply, but rather the concept is about the security of the State. The increasing dominance of national security interests in terrorism trials pays testament to this assertion. Gearty contends, however, that there is 'no need to accept the elision of security with state protection the way that an exclusive preoccupation with terrorism seems to focus us to do'.[935]

On the other hand, Lucia Zedner has argued that pursuant to this balancing task, security from the State is in fact being neglected.[936] Zedner effectively asks the most pressing

[932] Recent statistics revealed that in 36 of the 39 English and Welsh police forces, black people were more likely to be subject to stop and search powers than white people. At its most extreme, between December 2014 and April 2015, a black person in Dorset was 17.5 times more likely to be stopped than a white person. See N. Morris, 'Black People Still Far More Likely to be Stopped and Searched by Police than other Ethnic Groups', *The Independent* (6 August 2015).
[933] Anderson, 'The Terrorism Acts in 2015' (n. 596) 42. According to 'Stop Watch', despite comprising roughly 14% of the population, ethnic minorities account for 87% of those stopped for over an hour under Schedule 7 in 2014. See Stop Watch, 'Schedule 7 Stops under the Terrorism Act 2000', Factsheet (2013-14) at http://www.stop-watch.org/uploads/documents/Schedule7-201314.pdf.
[934] C. Gearty, *Liberty and Security* (Polity Press, 2013) 1.
[935] ibid, 108.
[936] Zedner, 'Securing Liberty in the Face of Terror' (n. 68) 532.

question: 'What tips the balance? In whose interests? And what lies in the scales?'.[937] For example, Luban argues that the presumption that liberties and rights are different from security is wrong in the sense that rights are themselves a form of security against State abuse.[938] Additionally, Luban contends that the Fallacy of the Perpetual Emergency reflects the troubling long-term effect of so-called emergency measures, as was witnessed in the aftermath of 9/11 with the detention of thousands of Middle Eastern men.[939]

4.4.2 The Rhetoric of Panic, Threat and Fear

Few contemporary issues attract as much public attention and media coverage as terrorism and counter-terrorism, and many commentators have explored how acts of terrorism are purposefully theatrical in nature.[940] However, in terms of counter-terrorism, fear of future terrorist attacks can play a role in eroding the public's commitment to upholding high human rights standards, and 'especially the rights of those considered to be "other".'[941] As already discussed, counter-terrorist hybrid orders have been implemented against a particularly narrow category of people, namely, males suspected of involvement in Islamist terrorism. However, for Fiona de Londras, an 'othered enemy' is just one of the 'vital ingredients' necessary for 'panic-related repression'; the others being 'a serious but unquantifiable risk, widespread and deeply felt fear, an impulse towards "security"…a security-conscious populace and a cadre of moral entrepreneurs ready to make the case that increasing their powers would also increase "our" security'.[942] In developing her argument, de Londras argues that the downwards recalibration of human rights in the UK and US can be attributed

[937] ibid, 509.
[938] Luban, 'Eight Fallacies About Liberty and Security' (n. 71) 245-246.
[939] ibid, 248-249.
[940] For example, Brian Jenkins famously argued, 'Terrorism is aimed at the people watching, not at the actual victims. Terrorism is theatre'. See B. Jenkins, 'International Terrorism: A New Kind of Warfare' (The RAND Paper Series, 24 June 1974) 4. See also J. Burke, 'Theatre of Terror', *The Observer* (21 November 2004); F. Furedi, 'Woolwich Murder: They Killed, Then They Performed – These Men should be Starved of our Attention', *The Independent* (23 May 2013); S. Carter, 'Boston and the Terrible Theatre of Terrorism', *Bloomberg.com* (18 April 2013) at http://www.bloomberg.com/news/2013-04-18/boston-and-the-terrible-theater-of-terrorism.html.
[941] de Londras (n. 46) 4.
[942] ibid.

to a combination of genuine 'bottom-up' fear and manufactured 'top-down' panic.[943] These different sources of panic are 'in concert, thus creating a significant political space within which to introduce laws and policies that result in an expansion of state power'.[944] Furthermore, de Londras contends that in times of panic, genuine public concern and governmental ambition may then correspond which allows for governmental action that would be unlikely to be accepted in normal circumstances.[945]

Of the two sources of panic, it is perhaps the nature of 'top-down' panic which is the most concerning and in need of further analysis, particularly in light of the mechanisms explored in this thesis which circumvent the criminal law and grant substantial power to the executive. One very graphic and publicly observable phenomenon which illustrates the notion of top-down panic in the UK is the official five-tier threat level system indicating the current threat assessment at any given time.[946] Other countries have, or have had, similar mechanisms, most notable of which was the almost identical 'Homeland Security Advisory System' which functioned in the USA between 2002 and 2011.[947] Since August 2006 in the UK, the Joint Terrorism Analysis Centre (JTAC), a self-standing organisation comprised of security experts from a variety of governmental departments, has set the threat level covering international terrorism threats. The UK's domestic Security Service, 'MI5', sets the threat level covering Irish and Northern Ireland-related domestic terror threats. The five tiers range from 'Low' and escalate through 'Moderate', 'Substantial', 'Severe', and peak at 'Critical' at the most serious.

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[943] ibid, ch 1 'Panic, Fear and Counter-Terrorist Law-Making'.
[944] ibid, 10.
[945] ibid, 30.
[946] The Security Service (MI5), Terrorism: Threat Levels at https://www.mi5.gov.uk/threat-levels.
[947] The Homeland Security Advisory System offered five tiers of threat level: 'Severe', 'High', 'Elevated', 'Guarded' and 'Low'. See Department of Homeland Security, Chronology of Changes to the Homeland Security Advisory System at http://www.dhs.gov/homeland-security-advisory-system. Other countries to operate public alert systems include Australia, the Netherlands and France. See, respectively, Australian National Security, 'National Terrorism Threat Advisory System' at https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx; Ministry of Security and Justice, 'National Coordinator for Security and Counterterrorism; Current threat level for the Netherlands' at https://english.nctv.nl/themes_en/Counterterrorism/terrorist_threat_assessment_netherlands/current_threat_level/; Gouvernement, 'Risques: Prévention Des Risques Majeurs, Menace Terroriste' at http://www.gouvernement.fr/risques/menace-terroriste.

After nearly two years in which the threat from international terrorism in the UK was deemed to be 'Substantial', the threat level was increased to 'Severe' in August 2014 when the role of British citizens who had left the country to fight in the conflicts in Iraq and Syria became clearer.[948] Speaking shortly after the announcement of the increase in the UK terror threat level, the Home Secretary said that the increase was related to developments in Syria and Iraq where terrorist groups were 'planning attacks against the West. Some of these plots are likely to involve foreign fighters who have travelled there from the UK and Europe to take part in those conflicts'.[949] The UK system received widespread attention again in May 2017 following the Manchester Arena terrorist attack, when the threat level was temporarily raised to 'Critical' for four days,[950] before returning to 'Severe', whilst the police and Security Service sought to identify whether the perpetrator had acted alone or with assistance.

The effectiveness and practicality of publicly disseminated terror alert levels such as these can be questioned for a number of reasons. First, at no point since the introduction of the UK system in 2006 has the threat from international terrorism dropped below the third tier, 'Substantial'. Whilst the lowest tiers represent conceivable choices which provide standards to be striven for eventually if the terrorist threat subsides, the steady maintenance of the threat level at the highest tiers arguably plays a significant role in publicly institutionalising a sense of permanent threat. Having said that, despite the obvious severity of the threat from international terrorism in recent months and years, the JTAC has demonstrated considerable restraint by only temporarily triggering the highest level twice in 2017.[951]

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[948] Statement by Home Secretary T. May, Home Office, Threat-level from international terrorism increased (29 August 2014) at https://www.gov.uk/government/news/threat-level-from-international-terrorism-increased. This, according to the threat level system, 'means that the threat of a terrorist attack is considered to be highly likely'.

[949] ibid.

[950] Prime Minister's Office, PM statement following second COBR meeting on Manchester attack: 23 May 2017 (23 May 2017) at https://www.gov.uk/government/speeches/pm-statement-following-second-cobr-meeting-on-manchester-attack-23-may-2017. This, according to the threat level system, 'means an attack is expected imminently'. The threat level was again raised to 'Critical' on 15 September 2017 for two days following the partial detonation of a bomb at Parsons Green London Underground station.

[951] Prior to the two terrorist incidents in 2017 that triggered the highest threat level, the last time the threat from international terrorism was 'Critical' was in 2007.

Second, the instructions given to the public as the threat level escalates are of limited use. On the one hand, the public are strongly encouraged, albeit in vague language, to be more vigilant and alert, and to assist the police when they can, begging the question as to what practical steps the majority of the public can actually take, if any.[952] In contrast, operators of city centres and major public venues such as shopping centres and places of entertainment have received additional training pursuant to Project Argus,[953] which instructs these individuals how to respond to terror threat levels. More dramatically, the police and security services can be given extra resources and powers in times of crisis which can be extremely visible, as demonstrated by the recent deployment of soldiers on the streets of London after the Manchester Arena attack.[954] Standing in some contrast, for example, the USA's DEFCON five-tier system requires the American military to implement specific actions in readiness for a potential conflict, whilst in a different context, hurricane warnings can instruct people to evacuate their homes or buy essential supplies.[955]

As already mentioned, the UK's experience in the aftermath of 9/11 raised particular concerns over the British Government's rhetoric towards the existence of a state of emergency.[956] On the threat of international terrorism and the existence of a state of emergency in the UK, the JCHR noted in 2010 that despite the withdrawal of the derogations

[952] Although the Homeland Security Advisory System in the USA differed in certain respects from the UK system, the lack of specific information given to the public that corresponded to the threat levels played a part in the decision to introduce the National Terrorism Advisory System, which scrapped the five tier threat level system and instead gives more detailed instructions that correspond with specified threats. See Department of Homeland Security, National Terrorism Advisory System: Frequently Asked Questions at https://www.dhs.gov/ntas-frequently-asked-questions.

[953] The National Counter-Terrorism Security Office deploys Counter-Terrorism Security Advisors to provide training to such operators throughout the country. For example, at one shopping centre with multiple vehicle entry points, managers deploy guards to the goods vehicle entrances to carry out more frequent vehicle searches if the terrorist threat increases. See HM Government, *Protecting Crowded Places: Design and Technical Issues* (January 2012) 37.

[954] Following the attack, the police asked for authorisation from the Secretary of State for Defence to deploy a number of soldiers on the streets to support armed police officers, pursuant to Operation Temperer. The Secretary of State for Defence approved the request, and British soldiers were temporarily deployed alongside armed police officers.

[955] B. Schneier, 'Why Terror Alert Codes Never Made Sense', *CNN* (28 January 2011) at http://edition.cnn.com/2011/OPINION/01/28/schneier.terror.threat.level/; B. Schneier, 'Do Terror Alerts Work?', *Schneier on Security* (October 2004) at https://www.schneier.com/essays/archives/2004/10/do_terror_alerts_wor.html.

[956] See above, section 4.2.

from the ECHR and the ICCPR in 2005, the British government had never actually relinquished its assertion that a public emergency threatening the life of the nation existed.[957] For example, in August 2007 the Government responded to the JCHR and insisted that despite the introduction of Control Orders and revocation of the derogation from the ECHR, its position on whether the UK faced a public emergency had not changed since 2001, and if anything that the threat had increased.[958] In December 2009, the JCHR heard evidence from David Hanson MP, the Minister of State for Security, Counter-Terrorism, Crime and Policing. When pressed about the Government's current position, the Minister maintained that there was still a potential public emergency,[959] whilst also avoiding the question of how low the threat level would have to get before a public emergency no longer existed.[960] When it was put forward by the Chairman of the JCHR to the Minister that the UK was in a permanent state of emergency, the Minister appeared to acquiesce to the suggestion.[961]

As such, the position of the Blair Government over the question of the existence of an emergency was repeatedly reprimanded by the JCHR:

> The Government's position that there is a public emergency threatening the life of the nation is important because it determines the starting point in any debate about the justification for counter-terrorism powers. Like the language of the 'War on Terror', it asserts the existence of a state of exception, which implies that exceptional measures require less justification than when times are normal. It amounts to a permanent claim

[957] JCHR, *Bringing Human Rights Back In* (n. 54) para 11.
[958] Government Reply (September 2007, Cm 7215) to the JCHR, *Counter–Terrorism Policy and Human Rights: 28 Days, Intercept and Post–Charge Questioning* (n. 482) 16, as noted in JCHR, *Bringing Human Rights Back In* (n. 54) para 11.
[959] JCHR, *Bringing Human Rights Back In* (n. 54) Q. 50.
[960] ibid, Qs. 52-55.
[961] ibid, Qs. 57-60.

> that courts and other accountability mechanisms should defer to the Government's assessment of what measures are required.[962]

The concept of 'top-down panic' and the 'deleterious effect' that the vague notion of a 'threat' can have on public debate can also be seen in the legislative processes behind the enactment of the statutory regimes pertaining to counter-terrorist hybrid orders. Underpinning this argument, a number of basic assumptions can be made. Firstly, given the growth of risk-averse policies and powers in the UK and the prioritisation of security, the 'profound fear of further attack weighs heavily in favour of security and against the protection of liberties'.[963] Secondly, 'the more ill-defined the threat, the greater its potential to tip the balance in favour of tougher security measures, to detain and hold suspects on the slightest of grounds, to carry out covert searches, and to suspend normal protections associated with due process and a fair trial'.[964]

4.4.3 Results of Content Analysis

Accordingly, in light of the general discussion of methodology earlier in Chapter 1,[965] some content analysis was undertaken for the purposes of this thesis. This was done in order to investigate the rhetoric of panic, threat and fear in the legislative processes leading to the enactment of the four key Acts of Parliament underpinning the counter-terrorist hybrid order regimes which were analysed in Chapter 3. Specifically, these are the Prevention of Terrorism (PT) Bill, the Terrorism Prevention and Investigation Measures (TPIM) Bill and the Counter-Terrorism and Security (CTS) Bill, which introduced Control Orders, TPIMs and TEOs respectively, whilst the Justice and Security (JS) Bill provided a significant opportunity for Parliament and the public to critically review the use of CMP.

[962] ibid, para 16.
[963] Zedner, 'Securing Liberty in the Face of Terror' (n. 68) 511.
[964] ibid, 512.
[965] See Chapter 1, section 1.5, text accompanying ns. 141-161.

In order to ensure consistency, the analysis was confined to the second readings and committee stages of each Bill in both Houses of Parliament as these arguably represent the most crucial stages of the legislative process,[966] whilst according strongly with the purpose of the more critically orientated methodologies outlined earlier which prioritise primary data.[967] Furthermore, in respect of the methodological commitment to show a 'sensitivity to power', it is imperative to pay particular attention to the contributions of some parliamentarians, Ministers in particular, who often introduce Bills in readings and whose contributions can dominate debates.

Before discussing the findings however, it is important to acknowledge the possible flaws and important differences of the sources which may limit the reliability and usefulness of the research. Firstly, the Bills were not all put through the legislative process in an identical manner, meaning that they differed in several important ways. Perhaps most significantly, the PT Bill was subject to a fast-track legislative procedure,[968] whereas the CTS Bill was semi fast-tracked through Parliament, limiting their exposure to scrutiny in and outside of the legislative process.[969] In contrast, the TPIM Bill and JS Bill were not subject to the same time pressures and did therefore face more pre-legislative scrutiny.[970]

Additionally, when the PT Bill and the CTS Bill reached the committee stages in the House of Commons, they were considered by Committees of the Whole House, meaning that the Bills were considered in the main chamber with every Member of Parliament able to participate and vote on its content.[971] This is a rare process usually reserved for Bills of

[966] See Chapter 1, section 1.5, text accompanying ns. 146-156.
[967] See above n. 123.
[968] See above n. 523
[969] See above n. 597.
[970] For a comparative analysis of the legislative scrutiny surrounding the PTA 2005 and the TPIM Act 2011 see Horne & Walker, 'Lessons Learned from Political Constitutionalism?' (n. 55).
[971] UK Parliament, About Parliament: How Parliament Works: Making Laws: Passage of a Bill at http://www.parliament.uk/about/how/laws/passage-bill/.

major constitutional importance or those the Government wishes to pass quickly, amongst other things.[972]

Secondly, the second readings and committee stage debates pertaining to the four Bills varied in length considerably, and as such, the sources that were analysed were not of similar length.[973] For example, the House of Lords committee stage debates were by far the lengthiest stages in terms of total word count during the enactment of the PT, JS and CTS Bills, whereas the House of Commons committee stage debate was the lengthiest stage during the enactment of the TPIM Bill. As such, it may be difficult to accurately compare the sources and draw any definitive conclusions. Furthermore, given the fast-tracked nature of the PT Bill and the semi fast-tracked nature of the CTS Bill, it is somewhat ironic that the parliamentary stages leading to the enactment of these two statutes were both lengthier than the equivalent stages during the passing of the TPIM Bill. However, this may be countered by the fact that parliamentary committees and civil society had far less time, if indeed any at all, to consider the proposals, undertake consultation, and provide critique or make recommendations to Parliament.

Lastly, there was some disparity between the amount of emphasis each of the four Bills placed upon the issues which this thesis is investigating. Whereas the PT Bill and the TPIM Bill focussed solely upon the statutory regimes pertaining to Control Orders and TPIMs respectively, the JS Bill concerned the oversight of intelligence and security agencies as well as the extension of CMP into the civil justice system. Moreover, the CTS Bill concerned a number of proposed amendments to existing counter-terrorism powers, including the existing TPIM mechanism, as well as the creation of the TEO mechanism and other new powers. As such, the sources analysed varied in how much of their content concerned counter-terrorist

[972] House of Commons Library, Bills whose Commons Committee Stage has been taken in Committee of the Whole House (SN/PC/05435, 2 July 2013).

[973] A table providing the breakdown of the lengths of the 16 parliamentary stages is provided in Appendix II. The total word counts of the second readings and committee stage debates for each Bill were as follows: the Prevention of Terrorism Bill (275,249 words); the Terrorism Prevention and Investigation Measures Bill (273,298 words); the Justice and Security Bill (434,071 words); the Counter-Terrorism and Security Bill (350,072 words).

hybrid orders. Despite these possible concerns, the results provide many interesting points to reflect upon, some of which lend support to this thesis.

With the aims and objectives of this thesis in mind, a number of queries were performed in respect of each Bill. These findings are summarised below in various figures and subsequently analysed, whilst the exact methods, search parameters and evidence of the research can be found in Appendix II. Given the limitations of these sources outlined earlier, no definitive conclusions should be drawn from the findings, and any conclusions that directly compare and contrast the various Bills should be treated with caution. However, the findings may help to shed some light on the general prevalence of rhetoric in the legislative processes leading to the enactment of counter-terrorist legislation.

Firstly, Query 1 entailed a comprehensive word frequency search of the second readings and committee stages of the four Bills to identify the general distribution of keywords that featured in the debates, with the condensed results displayed in Figures I-IV.[974] Before examining some of these notions and the specific contributions of certain parliamentarians in more detail, a brief analysis of the general distribution and frequency of keywords may be useful as it 'can help to acquire a better grasp of the leitmotif of deliberations in the making of counter-terrorism policies'.[975] From these findings, it will be useful to compare and contrast how often certain notions were raised in the second readings and committee stage debates.

[974] Only words of five characters or more were included in the word frequency query in the attempt to exclude some of the most prevalent bureaucratic language which featured heavily in the debates (i.e. 'hon', 'law', 'way' as in 'give way', 'Bill', 'home' as in 'Home Secretary', 'lord', 'peer', and years expressed in numerical values e.g. '2005'). Only the 30 most frequently mentioned words, including stemmed words, are listed in Figures I-IV (i.e. counts of the word 'liberty' includes any references to 'liberties'). The full breakdown of results is provided in Tables I-IV in Appendix II, Query 1.
[975] Demirsu (n. 144) 152.

Figure I: Total Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Prevention of Terrorism Bill

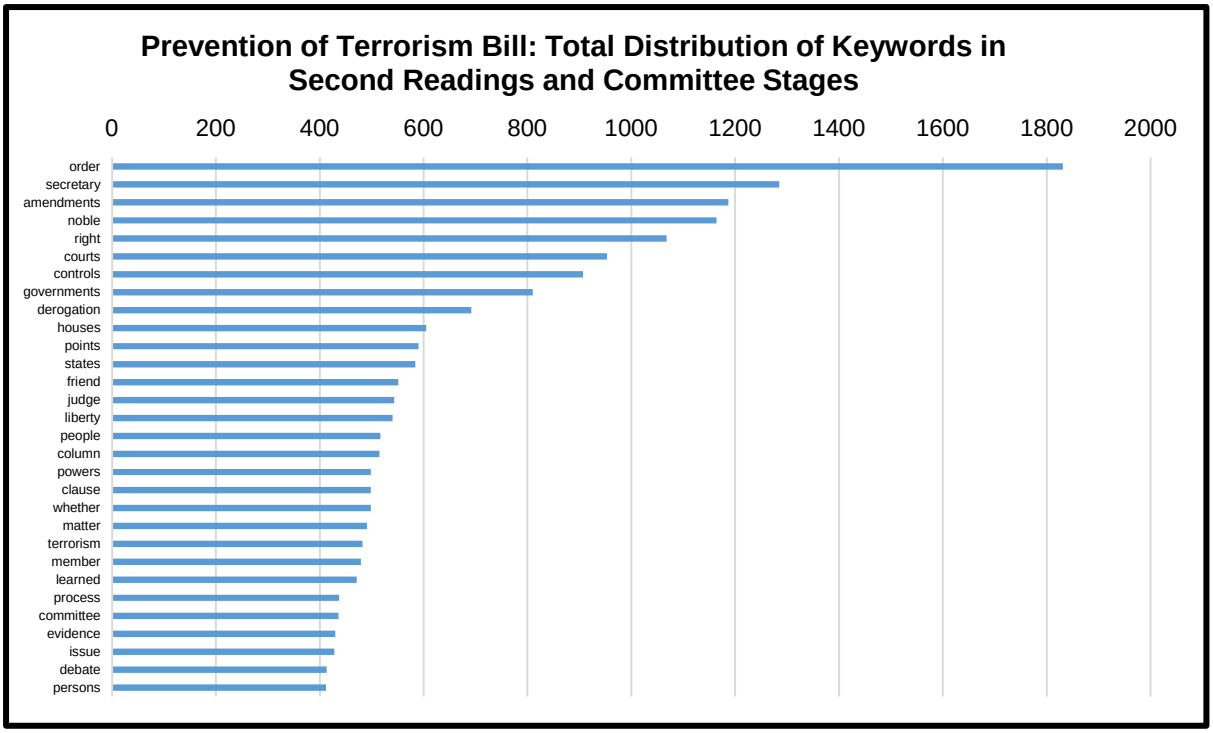


Figure II: Total Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Terrorism Prevention and Investigation Measures Bill

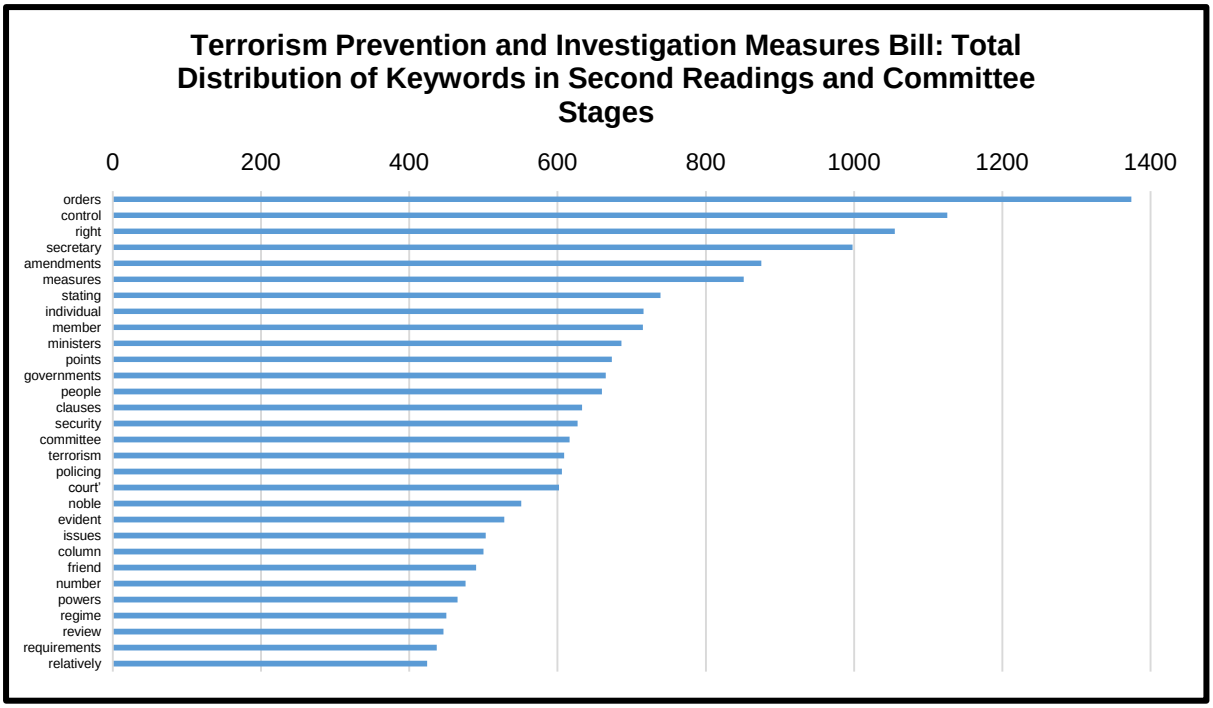


Figure III: Total Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Justice and Security Bill

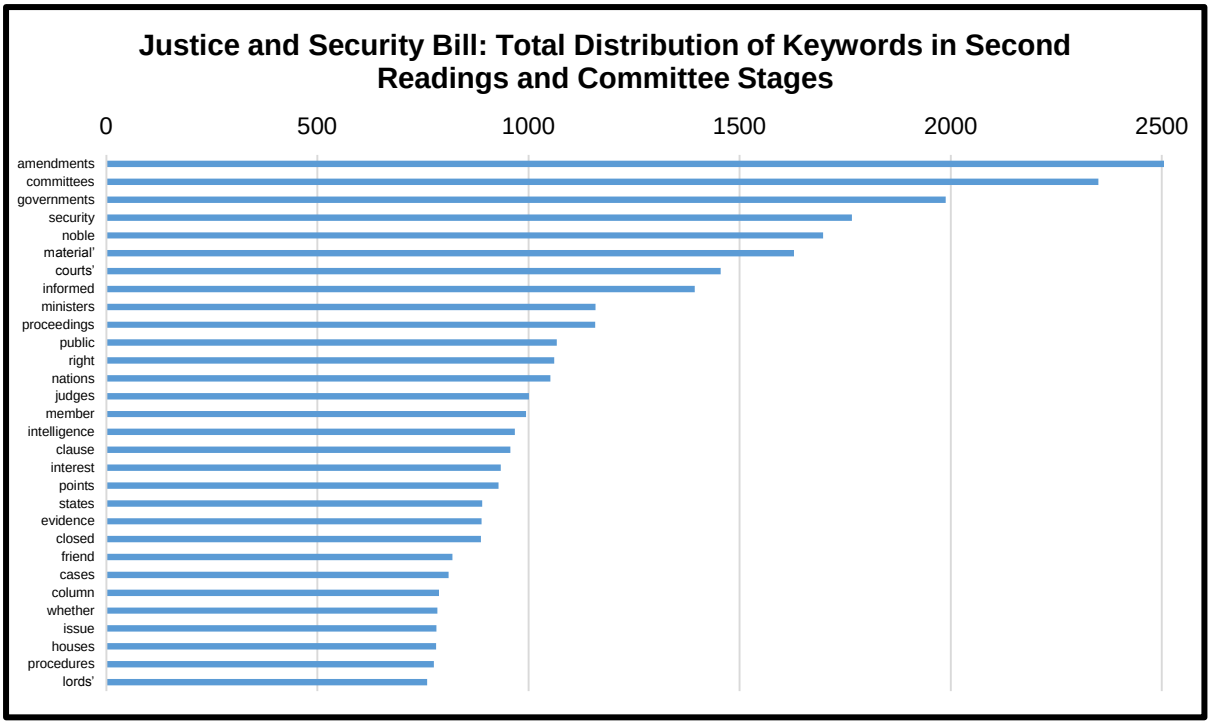
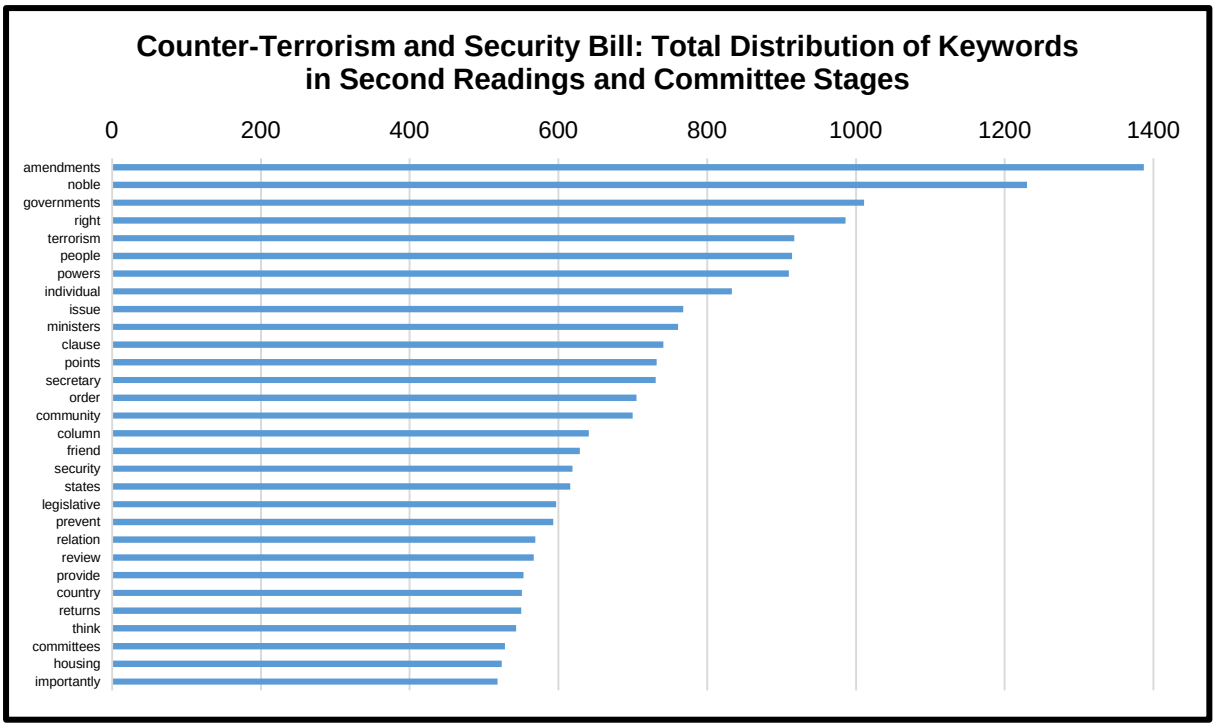


Figure IV: Total Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Counter-Terrorism and Security Bill



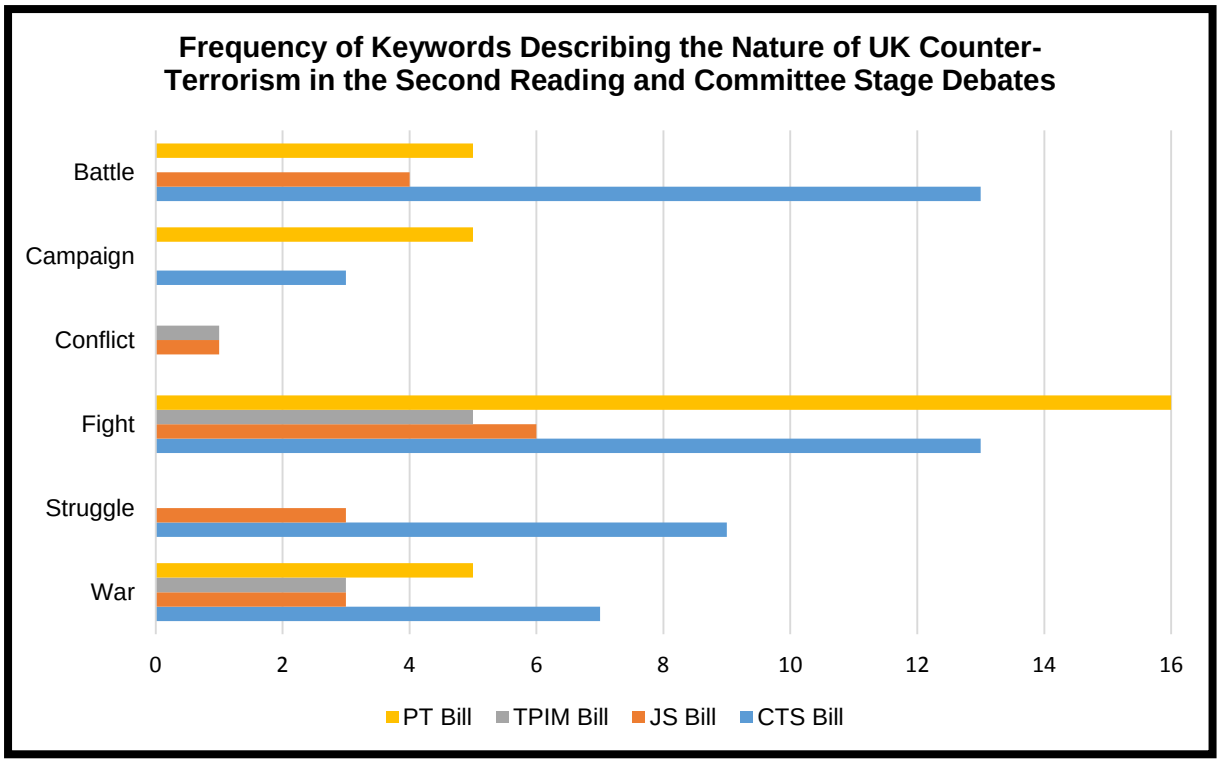
As Figures I-IV illustrate, common parliamentary language such as 'amendments', 'noble', 'member' and 'ministers' featured heavily in all the debates, which is unsurprising and of little value for the purposes of this thesis given the well-known formalities of parliamentary debates. Of far greater importance are how and why other notions were represented in the parliamentary debates, in particular those notions that shed some light upon the UK's general approach to counter-terrorism.

For example, the language contained in all of the examined parliamentary stages demonstrates to some extent how the UK has persistently rejected the war paradigm,[976] suggesting instead that the UK's general counter-terrorism approach is indeed grounded in the rhetoric of law. In all of the debates examined, the notion of a 'court' features heavily,[977] suggesting that the role of the judiciary is significant in respect of the counter-terrorism powers at stake. Other notions concerning judicial proceedings feature heavily in the PT and JS Bill debates in particular, with words such as 'evidence' and 'judge' featuring often in both.[978] Other notions in the various debates which further underpin the rhetoric of law include 'derogation' in respect of the PT Bill,[979] and 'proceedings' and 'disclosure' in respect of the JS Bill.[980]

In contrast to these findings, which provide some evidence that the UK's counter-terrorism approach is grounded in the rhetoric of law, adversarial and confrontational language scarcely featured in the debates. In that respect, Query 2 sought to identify how often provocative notions of a 'battle', 'campaign', 'conflict', 'fight', 'struggle', or 'war' in the context of countering terrorism were mentioned in the debates. As Figure V illustrates below, these notions did not feature heavily in the various parliamentary debates when compared to the rhetoric grounded in law.

[976] See Chapter 1, section 1.1, text accompanying ns. 28-31 and ns. 35-38.
[977] See Tables I-IV in Appendix II.
[978] See Tables I and III in Appendix II and Figures I and III above.
[979] See Table I in Appendix II and Figure I above.
[980] See Table III in Appendix II and Figure III above.

Figure V: Frequency of Keywords Describing the Nature of UK Counter-Terrorism in the Second Reading and Committee Stage Debates Pertaining to the Four Bills



The infrequency of such rhetoric during the various parliamentary debates to describe counter-terrorism efforts when compared to rhetoric grounded in law indicates to some extent that the UK has, *prima facie*, opted to abide by a law enforcement approach. Having said that, it is interesting that provocative rhetoric generally featured more heavily in the debates pertaining to the PT Bill and the CTS Bill which, as already noted, were both fast-tracked to some extent through Parliament. Moreover, the notion of a 'War on Terror' which has been so prevalent in counter-terrorism rhetoric in the USA was mentioned affirmatively only once during the second readings of the PT Bill and the TPIM Bill, and twice during the second readings of the CTS Bill by the same individual.[981] The notion of the 'War on Terror' was not mentioned during the second reading of the JS Bill.

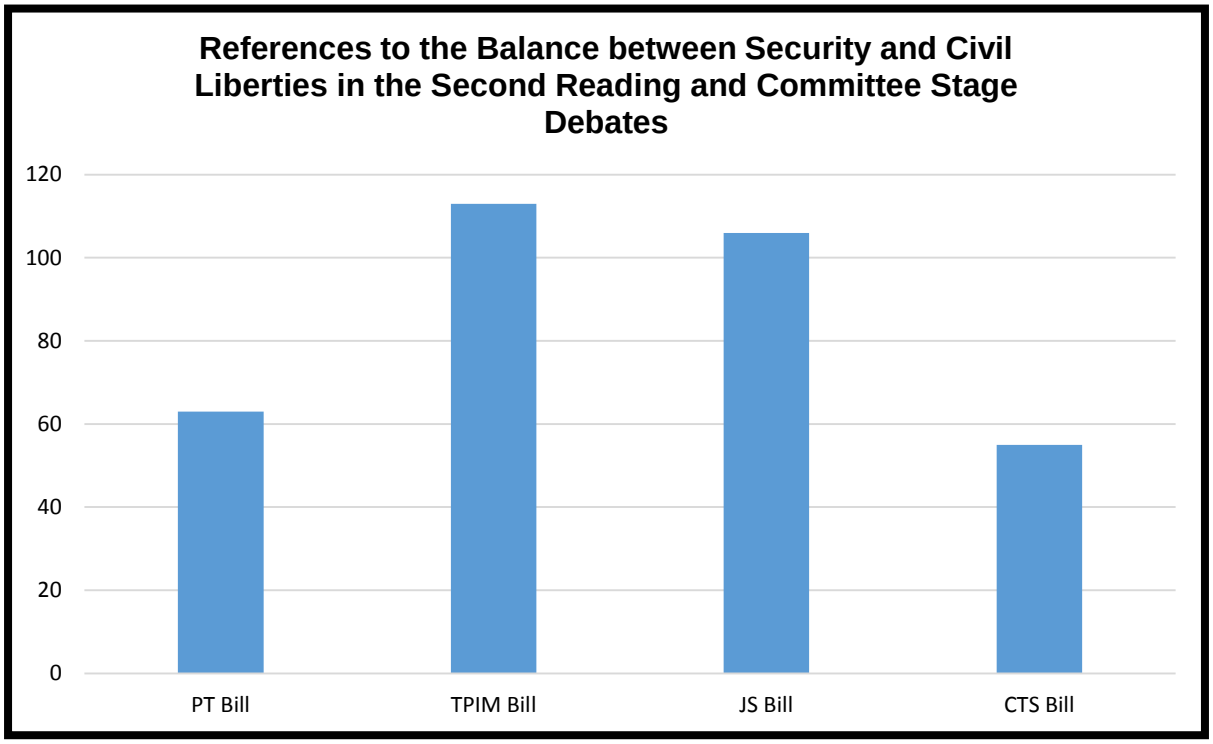
[981] See, respectively, C. Clarke, SSHD, HC Deb 23 February 2005, vol 431, col 336; T. Ellwood, HC Deb 7 June 2011, vol 529, col 112; Lord Thomas of Gresford, HL Deb 13 January 2015, vol 758, col 708.

Having verified, to some extent, that the UK's counter-terrorism approach has generally been grounded in the rhetoric of law, it may also be useful to consider the metaphor of balance between liberty and security that is often invoked when discussing national security and the legal responses to terrorism. As discussed earlier, the purportedly competing demands of the dual imperatives of liberty and security have been considered in depth by political, philosophical and legal commentators.[982]

In that respect, the purpose of Query 3 was to explore whether the perceived conflict between the rights of an individual and the rights of wider society factored into parliamentary debate, as the earlier analysis in this Chapter seems to imply.[983] The Query identified instances in which the notion of 'balance' was used to describe the relationship between the notion of security (whether that be state security or public security) and the civil liberties or rights of individuals.

[982] See above, section 4.4.1.
[983] See Appendix II: Query 3.

Figure VI: Frequency of References to the Balance between Security and Civil Liberties in the Second Reading and Committee Stage Debates Pertaining to the Four Bills



As the results from Query 3 which are illustrated in Figure VI indicate, the notion of striking a 'balance' between security and the civil liberties of individuals featured prominently in the various parliamentary debates. Despite the contradictions and fallacies tainting the metaphor of balance analysed earlier,[984] its use is clearly not confined to theory or academic debate. Rather, as the results show, the notion of 'balance' between security and liberties forms a real part of parliamentary debate when enacting legislation pertaining to counter-terrorism or national security issues. Nevertheless, some further observations can be made.

Given that the Home Office review of counter-terrorism powers in 2011 stressed that the 'imbalance' between the State's security powers and civil liberties had to be addressed,[985] it is unsurprising that the notion featured particularly heavily during the TPIM Bill parliamentary

[984] See above, section 4.4.1.
[985] Home Office, *Review of Counter-Terrorism and Security Powers* (n. 552) 3.

debates. For example, when opening the Bill's second reading, the then Home Secretary, Theresa May, emphasised that the balance between national security and civil liberties had to be re-struck.[986] It is also unsurprising that the notion featured heavily in the Justice and Security Bill parliamentary debates, given that one of the fundamental objectives of the Bill was to significantly expand CMP by conferring the power upon the Secretary of State to apply for any civil trial to proceed under CMP.

Lastly, in order to provide a more general picture of the prevalence of the rhetoric of panic, threat and fear in the various parliamentary stages, it will be important to consider how the notion of the terrorist threat was perceived and described by parliamentarians. As the proposed legislation inherently concerned matters of national security and counter-terrorism, it would be expected that the general notion of a terrorist 'threat' would feature prominently in all of the parliamentary debates that led to the enactment of the four Acts.

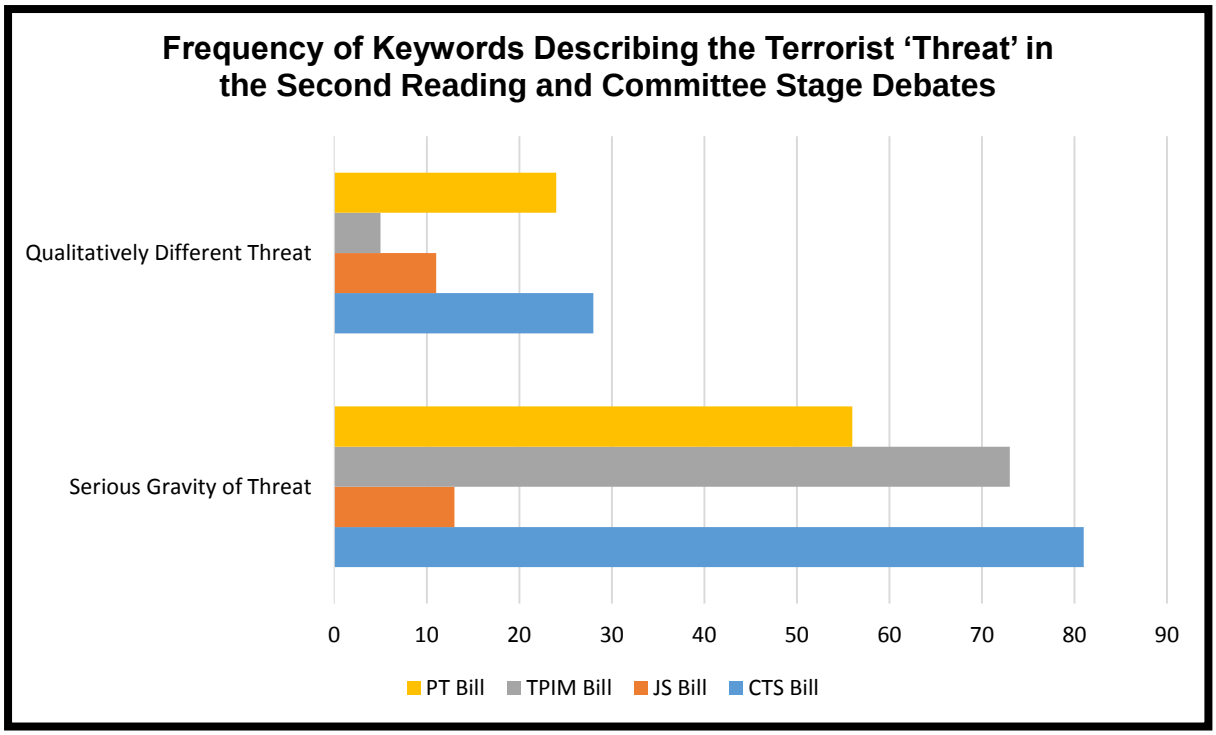
Of far greater importance is how the nature of the terrorist 'threat' in question was actually perceived and described by certain parliamentarians. As already discussed, in order to demonstrate sensitivity to issues of power, it is important to consider the contributions of Government ministers and Opposition shadow ministers.[987] On the one hand, Government ministers represent the executive which dominates Parliament, whilst on the other, the contributions of Opposition shadow ministers can strongly indicate if the Bill enjoys bipartisan support.

As such, the purpose of Query 4 was to analyse how and how often the terrorist threat was described by parliamentarians as being qualitatively different to previous threats (i.e. that the threat was evolving, different or unique), and how often the gravity of the terrorist threat was emphasised (i.e. that the threat was grave, serious or severe). The notion of 'risk' was initially considered due to its significance in counter-terrorism lexicon and relative similarity in meaning, but this was ultimately excluded for a number or reasons: the word 'risk' is

[986] T. May, SSHD, HC Deb 7 June 2011, vol 529, col 71.
[987] See Chapter 1, section 1.6, text accompanying ns. 157-160.

inherently less serious and more malleable than 'threat', and the word 'threat' is used exclusively by the authorities in relation to the terror alert levels explored earlier.[988]

Figure VII: Frequency of Keywords Describing the Terrorist 'Threat' in the Second Reading and Committee Stage Debates Pertaining to the Four Bills



As the results obtained by Query 4 and displayed in Figure VII indicate, the notion that the terrorist threat was qualitatively different in some way to previous threats featured only moderately in the various parliamentary debates, but these references remains significant nevertheless. In a general sense, it is understandable to some extent why the notion was mentioned more often in the PT Bill and CTS Bill debates, given that these Bills were fast-tracked through Parliament and that both Bills were presented directly in response to two specific but different moments of perceived crisis.

Firstly, the PT Bill was directly in response to the judgment of the House of Lords in the Belmarsh case, which effectively established a legal impasse in which the British

[988] See above, section 4.4.2, text accompanying ns. 946-955.

Government had to decide how to deal with terrorist suspects who could not be deported or prosecuted, nor no longer indefinitely detained.[989] Secondly, the CTS Bill was partly in response to the perceived changing nature of the terrorist threat, with UK citizens or citizens with the right to remain in the UK travelling to fight in Syria and Iraq (i.e. FTFs), before returning to the UK.[990]

However, when introducing the two Bills for debate in the second readings in the House of Commons, the respective Home Secretaries emphasised more specifically that the new powers were necessary in response to qualitatively different threats. When introducing the PT Bill, the Home Secretary, Charles Clarke, stated that 'Al-Qaeda and its network are qualitatively different in their destructive character' due to its 'catastrophic lack of restraint' and the fact that its resources and capabilities were of an 'utterly different order'.[991] When introducing the CTS Bill, the then Home Secretary Theresa May, stressed that the 'threat from terrorism is becoming ever-more complex and diverse', emphasising that '[w]e face the very serious prospect that British nationals who have fought with terrorist groups in Syria and Iraq will seek to radicalise others, or carry out attacks here'.[992]

In respect of the TPIM Bill debates, which featured far fewer references to the existence of a qualitatively different terrorist threat, this may accord with the objective of the Bill which was intended to liberalise existing counter-terrorism powers under the PTA 2005 to some extent, whilst responding to the same or similar nature of the terrorist threat.

Moreover, as the results obtained by Query 4 and displayed in Figure VII indicate, notions that emphasised the serious gravity of the terrorist 'threat' were often raised during the second readings and committee stages of each Bill in both Houses of Parliament, although

[989] See above, section 3.2.3.
[990] See above, section 3.3.3.
[991] C. Clarke, SSHD, HC Deb 23 February 2005, vol 431, cols 333-334 as referenced in Horne & Walker, 'Lessons Learned from Political Constitutionalism?' (n. 55) 273-274. See also *Home Office, Prevention of Terrorism Bill 2005 Background Briefing Papers: Paper One: The Threat* (TSO, 2005).
[992] T. May, SSHD, HC Deb 2 December 2014, vol 589, col 207.

significantly less so for the JS Bill when compared to the other three Bills in question. These findings are, again, arguably unsurprising for a number of reasons.

Firstly, the prevalence of these notions in the PT Bill and CTS Bill debates in particular may further reflect the fast-tracked nature of these Bills, and the assumption that new legislation was required to respond to the perceived changing nature of the threat. With the TPIM Bill, despite the aim to re-strike the balance between security and liberty, the prevalence of similar rhetoric in these debates may, in part, stem from the perceived continuation of the terrorist threat. Insofar as the JS Bill debates are concerned, which featured far fewer references to the serious gravity of the terrorist threat, this may reflect the fact that the Bill also addressed the oversight of intelligence agencies, which therefore stretched the scope of the debates beyond counter-terrorism issues. Equally, the Bill was presented to Parliament in order to extend the possibility of hearing proceedings under CMP to all civil trials, rather than to establish wholly new and novel powers pertaining to national security.

Given the underlying argument of the thesis and the significance of these findings, it will be important to consider the specific contributions of some parliamentarians in more detail. Clearly, the notion of a terrorist 'threat' was prevalent during the debates pertaining to the fast-tracked PT Bill.[993] For example, when introducing the PT Bill for its second reading in the House of Commons, the Home Secretary, Charles Clarke, opened his speech with a statement to that effect, illustrating the apparent urgency of the fast-tracked Bill:

> The core of the case for this legislation is that this country faces substantial and real threats to the freedoms of institutions and people in our society that are qualitatively different since 11 September 2001. Despite this country's long experience over decades of terrorism of different kinds in relation to Ireland and anti-colonial struggles of various descriptions, the

[993] See above Figure VII.

> nature of the threat that we now face is of a qualitatively different order and, in my opinion, requires qualitatively different measures.[994]

Similarly, when introducing the Bill in the House of Lords for its second reading, the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, stated early in his speech that the Bill needed to be 'seen in the context of the scale of the continuing and serious threat to the security of the United Kingdom from terrorism'.[995]

Despite being passed in 17 days, the passage of the PT Bill was a notoriously troublesome process, provoking widespread disagreements between the House of Commons and the House of Lords that ultimately led to legislative 'ping-pong' which involved Parliament sitting for 36 consecutive hours to agree the Bill's final content.[996] Insofar as the issue of bipartanship is concerned, the Bill struggled to gain widespread support and faced opposition from the Conservative Party and Liberal Democrats due to the substantive conditions that could be imposed under Control Orders, and concerns over procedural fairness when imposing the mechanisms. Nevertheless, during the Bill's second reading, the Shadow Home Secretary, David Davis, acknowledged the 'qualitatively different set of terrorist threats than existed before',[997] therefore appearing to echo some Governmental rhetoric. Despite the opposition of the Conservative Party, the Bill eventually attracted enough parliamentary support following the insertion of a sunset clause which required the operative provisions of the Act to be subject to annual renewal.[998]

In respect of the TPIM Bill, which was not fast-tracked through the legislative process as the PT Bill was, the notion of the terrorist 'threat' remained prevalent nevertheless.[999] There was, on the face of it however, greater concern for other issues at stake. Whilst insisting that the

[994] C. Clarke, SSHD, HC Deb 23 February 2005, vol 431, col 333.
[995] Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, HL Deb 1 March 2005, vol 670, col 116.
[996] Horne & Walker, 'Lessons Learned from Political Constitutionalism?' (n. 55) 272; House of Lords Select Committee on the Constitution, *Fast-Track Legislation* (n. 55) para 82.
[997] D. Davis, Shadow SSHD, HC Deb 23 February 2005, vol 431, col 354.
[998] PTA 2005, s. 13.
[999] See above Figure II and Figure VII.

threat remained serious, parliamentarians emphasised that other issues had influenced the introduction of the Bill. When the Home Secretary, Theresa May, introduced the Bill to the House of Commons for its second reading, she acknowledged the threat but immediately reflected the wish of the Government to strike a fairer balance between security and liberty:

> There is no greater task for any Government than to protect their citizens, to uphold their values and to defend their way of life, but when we face such a significant threat from terrorism over so great a period it becomes even more important that the Government ensure that the protection of our citizens does not overshadow the freedoms of us all.[1000]

Speaking in a similar tone when introducing the Bill in the House of Lords for its second reading, Lord Henley, the Minister of State for the Home Office, opened his speech by insisting that protecting the public from terrorism was always the 'top priority of the Government', and that the Government was 'committed to ensuring that the police and others have the powers they need to tackle terrorism'.[1001] However, Lord Henley added that the Government was also 'committed to ensuring that there is a correct balance between state powers and the civil liberties of individual citizens'.[1002]

Insofar as the issue of bipartanship is concerned, the TPIM Bill generated controversy and political disagreements for very different reasons to the PTA 2005. The Shadow Home Secretary, Yvette Cooper, criticised the Bill for 'recreating most of control orders while pretending not to do so',[1003] which would simultaneously weaken the powers of the Home Secretary in important ways, in particular, the removal of the power to forcibly relocate terror suspects. At the same time, the Labour Opposition criticised the inclusion of fewer safeguards, in particular, the decision to omit an annual renewal sunset clause from the

[1000] T. May, SSHD, HC Deb 7 June 2011, vol 529, col 69.
[1001] Lord Henley, Minister of State for the Home Office, HL Deb 5 October 2011, vol 730, col 1133.
[1002] ibid.
[1003] Y. Cooper, Shadow SSHD, HC Deb 2 June 2011, vol 529, col 79.

Bill.[1004] It was clear that for the Labour Party, the terrorist threat did not justify the substitution of the PTA 2005 for a more liberal framework. For example, during the House of Commons committee stage, Gerry Sutcliffe, the Shadow Minister for Home Affairs, emphasised that 'The risk level is at severe. We face threats from a whole range of people. When I was Prisons Minister, I visited some of our prisons and I saw some of the terrorists who had been prosecuted, and they really are scary people'.[1005] Ultimately, the Bill was passed despite the opposition of the Labour Party.

Lastly, in respect of the CTS Bill, the terrorist threat was again greatly emphasised.[1006] When the Home Secretary, Theresa May, introduced the CTS Bill to the House of Commons for its second reading, the immediacy of the terrorist threat had seemingly resurfaced. The Home Secretary stated that the threat from terrorism was 'serious, and it is growing'.[1007] However, reflecting the apparent shift in the source of the threat when introducing the CTS Bill for its second reading in the House of Lords, Lord Bates, the Under-Secretary of State for the Home Office, referred to the 'emergence of ISIL and its territorial gains in Syria and Iraq' which 'present a clear and present threat to our national security'.[1008] Lord Bates then added that 'nearly 600 people from the UK' were thought to have travelled to the region with almost half having returned.[1009]

In contrast to the PT and TPIM Bills which encountered strong opposition during the legislative process, the CTS Bill enjoyed support from the Labour Party to the extent that the Bill passed the reading stages in the House of Commons without division. For example, the Shadow Home Secretary, Yvette Cooper, expressed her support for the Bill and stressed the severity of the terrorist threat during its second reading: 'At a time when the terror threat has

[1004] The Shadow SSHD said that 'These powers should be treated as exceptional, not routine. If Parliament is prepared for such powers to be used, as I believe it should be, it should also be prepared and required to reflect on those exceptional powers each year.' See Y. Cooper, Shadow SSHD, HC Deb 5 September 2011, vol 532, col 135.
[1005] G. Sutcliffe, Shadow Minister for Home Affairs, Public Bill Committee 23 June 2011, col 55.
[1006] See above Figure IV and Figure VII.
[1007] T. May, SSHD, HC Deb 2 December 2014, vol 589, col 207.
[1008] Lord Bates, Under-Secretary of State for the Home Office, HL Dec 13 January 2015, vol 758, col 661.
[1009] ibid.

grown, more action is needed to make sure that the police, the security agencies and other organisations have the powers that they need to protect us.'[1010]

Accordingly, the findings gathered by Query 4 and displayed in Figure VII go some way to support the assumptions made earlier. Firstly, as de Londras argued, 'panic-related repression' can come about through the identification of a serious but unquantifiable risk, 'widespread and deeply felt fear', and 'an impulse towards security'.[1011] The frequency and quality of language used to convey the nature of the terrorist threat in the parliamentary debates corresponds with these assertions. Secondly, as Zedner argued, the fear of further attack can weigh heavily in favour of security and against civil liberties, and 'the more ill-defined the threat, the greater its potential to tip the balance in favour of tougher security measures, to detain and hold suspects on the slightest of grounds, to carry out covert searches, and to suspend normal protections associated with due process and a fair trial'.[1012] The results illustrated in Figure VII undoubtedly lend support to these arguments.

4.5 Looking Beyond Counter-Terrorist Hybrid Orders: The Normalisation of the Exceptional

It is now a truism that legislation which undermines civil liberties in the name of national security can be gradually normalised over time.[1013] Indeed, if what was originally justified as an exception and necessary in response to a threat is then slowly spread to other areas of law, the base level of what is considered acceptable may be pushed up as the unthinkable actually becomes normalised over time.[1014] In other words, 'in any future crisis government

[1010] Y. Cooper, Shadow SSHD, HC Deb 2 December 2014, vol 589, col 217.
[1011] de Londras (n. 46).
[1012] Zedner, 'Securing Liberty in the Face of Terror' (n. 68) 511-512.
[1013] See in particular Gross & Aoláin, *Law in Times of Crisis* (n. 50) 228-243; IComJ, 'Assessing Damage, Urging Action' (n. 44) 40-42; Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency* (n. 59); JCHR, *Bringing Human Rights Back In* (n. 54) ch 2 'Normalising the Exceptional'.
[1014] Gross & Aoláin, *Law in Times of Crisis* (n. 50) 228.

will take as its starting point the experience of extraordinary powers and authority granted and exercised during previous emergencies'.[1015]

In the context of states of emergency, the JCHR warned in 2010 against the British government's rhetoric and practice which ran the risk of 'normalising the exceptional'.[1016] This was because, since the enactment of the ATCS Act 2001 which resulted in the Government's derogation from Article 5 of the ECHR, the British position that a state of emergency was in existence lasted, perhaps, until at least December 2009, whilst there has never been an official retraction since. Moreover, with the new Coalition Government in May 2010 it was not clear if the situation had changed. This is problematic for several reasons. As the JCHR suggested, 'the Government's approach means that in effect there is a permanent state of emergency, and that this inevitably has a deleterious effect on public debate about the justification for counter-terrorism measures'.[1017]

Going further, the JCHR spoke more cautiously about the behaviour of the British Government and the nature of executive power in the UK when public emergencies arise. The Committee stated, 'under our current arrangements derogation is an essentially executive act and there is very little to ensure that there will be an opportunity for parliamentary scrutiny of the Government's justification for derogating in the event that it decides to do so'.[1018] This led the JCHR to suggest that there is a 'woeful lack of opportunities for parliamentary scrutiny of such a derogation under current arrangements' to the extent that they suggested a statutory framework be enacted to allow proper parliamentary scrutiny.[1019]

With these issues in mind, some of the conduct of the UK in the past decade and particularly in the past few years has raised concerns that certain aspects underpinning counter-terrorist

[1015] ibid.
[1016] JCHR, *Bringing Human Rights Back In* (n. 54) ch 2 'Normalising the Exceptional'.
[1017] ibid, para 15.
[1018] ibid, para 27.
[1019] ibid, para 28.

hybrid orders that have been explored in this thesis are no longer exceptional phenomenon. Rather, the progressive expansion of CMP into other areas of law, and plans to introduce a new counter-extremism civil order that may replicate some of the fundamental characteristics of counter-terrorist hybrid orders, strongly indicates that exceptional aspects of contemporary national security policy are rapidly becoming more mainstream and normalised.

4.5.1 Closed Material Procedures

The use of CMP, which has been a particular focus of this study, is a clear example of an exceptional phenomenon that has become normalised and spread to other areas of law.[1020] It was noted in the House of Commons in 2010 that there were 'no fewer than 22 different types of court hearings' in which Special Advocates could be deployed.[1021] Since the introduction of the SIAC in 1997,[1022] the use of CMP has been extended to many other courts and tribunals. In addition to proceedings concerning the three mechanisms analysed in this study, CMP can be used in, or by, *inter alia* the Northern Ireland National Security Certificate Review Tribunal;[1023] the Proscribed Organisations Appeals Commission;[1024] the Investigatory Powers Tribunal;[1025] the Pathogens Access Appeals Commission;[1026] the Northern Ireland Sentences and Life Sentences Review Commissioners;[1027] Parole Board

[1020] See E. Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source' (2015) 78 MLR 913.
[1021] A. Dismore, HC Deb 1 March 2010, vol 506, col 739. See also JCHR, *Bringing Human Rights Back In* (n. 54) para 58; Metcalfe, 'Secret Evidence' (n. 99) para 79.
[1022] SIAC Act 1997, ss. 5-6 and Part 7 of the SIAC (Procedure) Rules 2003 [SI 2003/1034].
[1023] Northern Ireland Act 1998, ss. 90-91; Northern Ireland Act Tribunal (Procedure) Rules 1999 [SI 1999/2131] Rule 3.
[1024] S. 5 and Schedule 3 to the TA 2000, para 5(4); Part 2 of the Proscribed Organisations Appeal Commission (Procedure) Rules 2007 [SI 2001/443].
[1025] Regulation of Investigatory Powers Act 2000, s. 69; Investigatory Powers Tribunal Rules 2000 [SI 2000/2665] Rules 6 & 10.
[1026] S. 70 and Schedule 6 to the ATCS Act 2001, paras 5-6; Pathogens Access Appeal Commission (Procedure) Rules 2002 [SI 2002/1845] Rules 8 & 18.
[1027] Schedule 2 to the Northern Ireland (Sentences) Act 1998, paras 6-7; Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 [SI 1998/1859]; Life Sentences (Northern Ireland) Order 2001 [SI 2001/2564].

hearings;[1028] employment tribunals;[1029] asset-freezing and financial restrictions proceedings;[1030] and passport seizures.[1031]

Although these developments are all significant in their own right, the possibility for a court to authorise the use of CMP in any civil trial pursuant to the JSA 2013 is the most significant extension.[1032] Specifically, the JSA 2013 extends the possibility of implementing CMPs in any civil case following an application to the High Court, Court of Appeal, Court of Session, or Supreme Court.[1033] During the consultation stage of the Justice and Security Green Paper in 2012, Eric Metcalfe stated before the JCHR in 2012 that:

> It is interesting to note that the Lord Chancellor…suggested that the secret evidence or the closed material procedure would only be applied to a handful of cases. You go back to Hansard in 1997 when the Special Immigration Appeals Commission bill was first being debated and you find similar statements by Home Office Ministers…saying exactly this, that the special advocate closed material procedure in SIAC would only be used in a handful of cases. Since that time, over the last 15 years, the use of closed proceedings in UK courts and tribunals has expanded considerably.[1034]

[1028] The possibility of CMP in parole board hearings first applied in Northern Ireland. See Criminal Justice (Northern Ireland) Order 2008 [SI 2008/1216] and the Parole Commissioners' Rules (Northern Ireland) 2009 [SI 2009/82]. This was later extended to the UK more broadly. See the Parole Board Rules 2011 [SI 2011/2947] issued by the Secretary of State for Justice under the powers conferred by the Criminal Justice Act 2003, s. 239(5).
[1029] In Northern Ireland, see the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005. In the rest of the UK, see Employment Tribunals Act 1996, s. 10 and Schedules 1 and 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. See also the Race Relations Act 1976, s. 67A(2), as amended by the Race Relations (Amendment) Act 2000, s. 8.
[1030] Counter-Terrorism Act 2008, ss. 66-68 and Part 79 of the CPR.
[1031] CTS Act 2015, s. 3(3).
[1032] JSA 2013, s. 6.
[1033] ibid.
[1034] JCHR, *The Justice and Security Green Paper* (2010-12, HC 1777-i-v) Oral Evidence (6 March 2012).

In that regard, applications made to court for a trial to proceed under CMP pursuant to section 6 of the JSA 2013 doubled in the second year of the statute's existence. During 2013-2014, five applications were made,[1035] whereas 11 applications were made during 2014-2015.[1036] The number of applications rose again slightly to 12 during 2015-2016.[1037] Reflecting on the second reporting year, Lawrence McNamara warned that the increase in applications and range of issues concerned made it clear that 'closed material proceedings and closed judgments cannot be considered extraordinary' but that they 'appear to be becoming the norm', thus representing 'a major departure from our traditions of open justice and the accountability those traditions help secure'.[1038]

In essence, as exceptional measures become more widespread, the adverse consequences of the measures become more commonplace, and may therefore become more tolerated and accepted amongst society. The extension of CMP represents an extension of a legal framework which undermines certain fair trial guarantees of the accused, thus indicating the second characteristic of behaviour typically exhibited by States enduring prolonged emergencies. Moreover, as the use of CMP becomes more common in civil proceedings, the criminal law as the traditional route to address alleged serious activity may be neglected. Ultimately, as Lord Neuberger recognised in *Al Rawi v. Security Service*, '[I]t is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it "is applicable only in exceptional circumstances" nonetheless often becomes common practice'.[1039]

[1035] Ministry of Justice, *Report on Use of Closed Material Procedure (from 25 June 2013 to 24 June 2014)* (July 2014). See also L. McNamara & D. Lock, *Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State (Bingham Centre Working Paper 2014/03)*, Bingham Centre for the Rule of Law, BIICL, London, 2014.
[1036] Ministry of Justice, *Report on Use of Closed Material Procedure (from 25 June 2014 to 24 June 2015)* (October 2015).
[1037] Ministry of Justice, *Report on Use of Closed Material Procedure (from 25 June 2015 to 24 June 2016)* (November 2016).
[1038] O. Bowcott & I. Cobain, 'Secret Court Case Application Numbers more than Double in a Year', *The Guardian* (15 October 2015).
[1039] *Al Rawi and others v. Security Service and others* [2010] EWCA Civ 482, para 73.

4.5.2 The Counter-Extremism Proposals

The Cameron Government's counter-extremism proposals under the Counter-Extremism and Safeguarding Bill demonstrate how other aspects pertaining to the various counter-terrorist hybrid order regimes may be normalised further.[1040] Dispensing with the various 'Orders' described in the previous 'Counter-Extremism Bill' outlined in 2015,[1041] the new Bill, if the current Government seeks to pursue it, will include *inter alia* a 'new civil order regime to restrict extremist activity'. It is entirely possible that these orders will be implemented and administered in a similar manner to counter-terrorist hybrid orders, and in that respect, present similar challenges to the right to a fair trial. Like counter-terrorist hybrid orders, one of the most fundamental aspects of the new civil order regime will be the threshold of belief or suspicion that must be met in order to impose the mechanism. Moreover, it remains to be seen what role the courts will have in the implementation of the orders, and equally crucial, whether the relevant proceedings will be heard under CMP. More broadly, the former Prime Minister, David Cameron, repeatedly described the struggle to defeat extremism as a 'generational challenge',[1042] indicating perhaps that when the Counter-Extremism and Safeguarding Bill comes before Parliament, it may be subjected to rhetoric similar to that witnessed during the enactment of the counter-terrorist hybrid order statutory regimes.

[1040] According to the Briefing Notes of the 2016 Queen's Speech, the legislation will 'prevent radicalisation, tackle extremism in all its forms, and promote community integration'. See Prime Minister's Office, The Queen's Speech 2016 (18 May 2016) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf.

[1041] According to the Briefing Notes of the 2015 Queen's Speech, these would include 'Banning Orders', 'Closure Orders', broadcasting restrictions, employment checks, and most importantly, 'Extremism Disruption Orders' (EDOs). See Prime Minister's Office, The Queen's Speech 2015 (27 May 2015) 62-63 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf. On 13 October 2015, the Government published its Counter-Extremism Strategy which shed some light on the aims and content of the proposals. See HM Government, *Counter-Extremism Strategy* (Cm 9148, October 2015).

[1042] C. Hope, 'Our Generational Struggle against a Poisonous Ideology', *The Daily Telegraph* (16 August 2014); BBC News, 'UK in "Generational Struggle" against Terror, says PM' (21 January 2013) at http://www.bbc.co.uk/news/uk-politics-21130484.

During the research phase of this study, a freedom of information request was submitted to the Home Office in the attempt to clarify the nature of the proposed civil order regime.[1043] Although the request was unsuccessful, the previous Government had pledged to conduct a full and wide public consultation on the Bill in its entirety.[1044] This will provide a useful window of opportunity for relevant stakeholders to input into the drafting of the proposals.

Confirming that many of the concerns explored in this thesis will arise with the new proposals, Karen Bradley, the then Government Minister for Preventing Abuse, Exploitation and Crime, discussed the proposed 'civil order regime' at length when presenting evidence before the JCHR in June 2016.[1045] The Minister suggested that the Government were envisaging:

> [A] civil order regime, the breach of which would be a criminal act. We are looking at quite a high threshold, because breach of it would be not a civil penalty but a criminal penalty. We are looking at what would be the right threshold and level for that civil order, so that we can deal with activities that do not get to the criminal level of activity for incitement.[1046]

As such, it is entirely possible that the civil orders will be implemented by the Home Secretary on the basis of reasonable suspicion or belief, or on the balance of probabilities, of the individual's involvement in extremist behaviour. As experience with counter-terrorist hybrid orders demonstrates, whether relying upon 'reasonable suspicion', 'reasonable belief' or the 'balance of probabilities', the standards all fall someway short of the tougher and more familiar criminal standard of 'beyond all reasonable doubt' which is integral to the more stringent criminal limb of the right to a fair trial. Moreover, the proposals appear to replicate counter-terrorist hybrid orders by attaching criminal penalties to the breach of conditions

[1043] See Appendix I.
[1044] ibid. See also JCHR, *Legislative Scrutiny: Extremism Bill*, Oral evidence presented by Karen Bradley, Parliamentary Under Secretary of State, Home Office (Minister for Preventing Abuse, Exploitation and Crime) (29 June 2016).
[1045] ibid.
[1046] ibid, Q. 11.

which are imposed upon individuals in proceedings conducted under the less stringent civil limb of the right to a fair trial. As such, the implementation and judicial oversight of the new civil order regime may run the risk of replicating some of the most controversial aspects of Control Orders, TPIMs and TEOs by departing from the ordinary protections afforded under the criminal law.

Like the terminology underpinning counter-terrorist hybrid orders, clear problems will also lie in the definitions of key terms operating at the heart of the counter-extremism proposals. In particular, much controversy has developed over the meaning of 'extremism', and what actions or beliefs will amount to 'violent extremism' and 'non-violent extremism'.[1047] Presenting evidence before the JCHR on the Extremism Bill, the previous and the then in post Independent Reviewer of Terrorism Legislation expressed doubts over the proposals, which the JCHR reflected in its recently published report on the proposals.[1048] Lord Carlile stated that many of the powers will be extremely hard to define, and in any event would likely be 'butchered' in the House of Lords.[1049] Moreover, Lord Carlile expressed concern at making 'unlawful that which we have always taken to be lawful', offering the examples of people who advocated creationism or people who refuse to speak English and only speak Welsh.[1050] Anderson concurred and suggested it was practically impossible to define 'extremism'.[1051] The widespread concerns with the potential definition of 'extremism' and implications of the extremism proposals have also been voiced by senior police officers,[1052] and an alliance of politicians, campaign organisations and faith groups.[1053]

[1047] HM Government, *Counter-Extremism Strategy* (n. 1041).
[1048] JCHR, *Counter-Extremism* (2016-17, HL 39, HC 105).
[1049] JCHR, *Legislative Scrutiny: Extremism Bill*, Oral evidence presented by David Anderson QC and Lord Carlile (9 March 2016) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterextremism-bill/oral/30366.html Q. 11.
[1050] ibid.
[1051] ibid.
[1052] V. Dodd, 'Anti-Radicalisation Chief says Ministers' Plans Risk Creating "Thought Police"', *The Guardian* (24 May 2016); M. Townsend, 'Police and Faith Alliance Attacks Counter-Extremism Bill', *The Observer* (21 May 2016).
[1053] The Guardian, 'Counter-Extremism Bill Puts our Rights at Risk' (23 May 2016).

In that regard, the former IRTL has identified 15 particularly difficult issues which the counter-extremism proposals raise.[1054] Insofar as the right to a fair trial is concerned, the Reviewer effectively summarised one of the most recurring criticisms of counter-terrorist hybrid orders when he questioned 'why it is deemed necessary to resort to civil orders rather than the creation of additional criminal offences, thereby removing the protections inherent in jury trial from those accused of extremist activity'.[1055] Repeating these sentiments in March 2016 whilst presenting oral evidence on the Extremism Bill before the JCHR, Anderson expressed 'great reservation about using a system of civil orders as a substitute for trial by jury'.[1056] The Independent Reviewer also probed what the maximum duration and lapse period of 'Extremism Disruption Orders' would be,[1057] before questioning 'the penalties for breach of the new civil orders that the criminal courts will be able to impose, and whether those penalties are to be considered proportionate in view of the types of conduct being restrained'.[1058] Furthermore, the Reviewer has queried 'the burden of proof that will be required for the making of civil orders, whether they will be made by Ministers or judges and the provision for and likely time scale of appeals'.[1059]

4.6 Contemporary British Counter-Terrorism Policy: Manipulating the Margins of Permissible Conduct under International Human Rights Law

This thesis has argued that certain aspects pertaining to the design and implementation of counter-terrorist hybrid orders do not accord with the long established standards of procedural fairness in the UK, and that this has been made possible due to the establishment of the state of perpetual quasi-emergency. At the most extreme, some

[1054] D. Anderson, 'The Terrorism Acts in 2014: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (September 2015).
[1055] ibid, para 9.29(f).
[1056] JCHR, *Legislative Scrutiny: Extremism Bill* (n. 1049) Q. 11.
[1057] Anderson, 'The Terrorism Acts in 2014' (n. 1054) para 9.29(i) and (j).
[1058] ibid, para 9.29(k).
[1059] ibid, para 9.29(g).

aspects of these mechanisms may have amounted to a 'covert derogation' from IHRL.[1060] According to Helen Fenwick and Gavin Phillipson, a covert derogation is the attempt to:

> [U]se the threat of terrorism not as a reason for openly derogating from human rights standards, but instead to persuade Parliament and the judiciary into acquiescing in the creation of minimal interpretations of certain ECHR rights that stripped them of much of their content.[1061]

In other words, these are pre-emptive attempts to dilute and redefine what human rights standards actually apply when counter-terrorist hybrid orders are implemented. Arguably the strongest example of a covert derogation in this regard can be seen with the curfews imposed upon early Control Order subjects. As discussed earlier, an 18 hour curfew imposed upon the earliest Control Order subjects was found to have violated Article 5 of the ECHR.[1062] Although the Courts consistently maintained that the hearing of Control Orders did not amount to the determination of a criminal charge, some of the conditions attached to the mechanisms were akin to, or were at times, 'far more draconian punishment than many criminal sanctions, including fines, probation, community service, and suspended sentences'.[1063]

Insofar as the procedural fairness of the earliest Control Orders is concerned, the lack of disclosure of the allegations and the conditions under which mechanisms were imposed were so restrictive that it could be argued that the Government was relying upon an unacknowledged derogation from the right to a fair trial.[1064] Despite the fact that the most extreme challenges witnessed in the earliest days of the Control Order regime have been

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[1060] As alluded to in the Literature Review, when States implement preventive policies which are likely to stretch the limits of IHRL, States have to decide whether to assert that human rights are inapplicable, derogate from human rights obligations, or find a way of diluting rights standards. See Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52).
[1061] ibid, 867.
[1062] *SSHD v. JJ* (n. 655).
[1063] Fenwick & Phillipson, 'Covert Derogations and Judicial Deference' (n. 52) 878. The argument that the restrictions permitted under counter-terrorist hybrid orders can amount to criminal punishment was explored in Chapter 3, section 3.4.1.
[1064] ibid.

reduced somewhat due to the requirement of a minimum level of disclosure, the wider concerns over the effects of counter-terrorist hybrid orders for the right to a fair trial have clearly endured.

These developments, which can be seen as an erosion of high human rights standards, may also be described as an attempt to recalibrate what the standards even are. Insofar as the policy of detention is concerned, Fiona de Londras argues that the UK has not replicated the USA's approach which denied the applicability of human rights. Instead, the UK has asserted that the current terrorist threat is so severe that certain IHRL standards should be recalibrated, which poses a significant challenge to pre-existing standards.[1065] Going further, the UK's approach may represent what de Londras has described as an 'internal challenge' to IHRL in the sense that the UK has not attempted to dismiss the applicability of IHRL altogether, but rather, it has deliberately sought to scale back the strength of the rights in question.

Insofar as counter-terrorist hybrid orders are concerned, the content analysis undertaken earlier suggests that British parliamentarians have indeed emphasised the significance of the terrorist threat and that rights of individuals ought to be balanced with those of the public. At the same time, the most extreme rhetoric of the 'War on Terror' has had a negligible role in the legislative process and the primacy of prosecution has remained the priority of subsequent UK governments.

With this in mind, it has been argued that the right to a fair trial has been significantly affected in a number of ways. The deliberate framing of counter-terrorist hybrid orders as civil in nature, which therefore invokes the civil limb of the right to a fair trial rather than the more stringent criminal limb, has significantly reduced the scope of fair trial guarantees available to individuals subject to these mechanisms. In that regard, the principles of open and natural justice which have been fundamental to the common law for centuries have

[1065] de Londras (n. 46) 101.

been adversely affected in response to national security concerns. Building upon these concerns, the rights of individuals under IHRL to a public trial, including the right to a reasoned judgment, and the rights to the equality of arms and to an adversarial trial, have been similarly challenged. The dangers of such laws are pertinent, but cannot be viewed in isolation.

Although this thesis has analysed the notion of the state of perpetual quasi-emergency strictly in relation to the design and implementation of counter-terrorist hybrid orders and the right to a fair trial, this is just one aspect of contemporary British counter-terrorist policy that raises serious questions over the extent of the UK's adherence to IHRL. Clearly, it may be possible that the progressive expansion of other counter-terrorist powers which appear to stretch the limits of IHRL may also have been allowed to occur as a result of, *inter alia*, definition 'creep' of certain terminology, occasional judicial deference, a flawed balancing metaphor purportedly justifying the trade-off of rights, and the rhetoric of panic, threat and fear.

Most obviously, the compatibility of counter-terrorist hybrid orders with the right to liberty may be subjected to similar analysis and yield similar results, in the sense that the perpetual quasi-emergency has created the space necessary for the harsh conditions to be accepted by lawmakers, the judiciary, and the public more broadly. Going further, other administrative counter-terrorist powers that share some characteristics with the mechanisms analysed in this thesis, such as asset-freezing measures, may be analysed in a similar manner. More specifically, it may be useful to assess what legal and extra-legal factors may have played a part in the policy decisions underpinning these powers that have, to some extent, circumvented the traditional criminal process and, possibly, led to the margins of permissible conduct under IHRL being manipulated in a similar manner. In essence, although the history and development of counter-terrorist hybrid orders raise unique challenges vis-à-vis the right to a fair trial, the specific problems explored in this thesis could be said to be symptomatic of a broader legal problem in the UK.

4.7 Conclusions

Having concluded in Chapter 3 that the three mechanisms explored in this thesis do not systematically violate the right to a fair trial, this chapter has sought to identify why they have nevertheless been accepted in the UK with its well-known attachment to high human rights standards. Crucially, this chapter has argued that the acceptance of these mechanisms as they are currently designed is due to the establishment of the perpetual quasi-emergency. Whilst being fundamentally grounded in law, this denotes the legal environment in which the mechanisms stretch the margins of permissible conduct of IHRL and have, at least in the earliest days of the Control Order regime, occasionally strayed beyond these margins. After outlining how and why this situation came into being, this chapter has identified what legal and extra-legal factors have helped to preserve the perpetual quasi-emergency. Lastly, the chapter examined what characteristics of counter-terrorist hybrid orders may be in the process of being normalised, before concluding that current practice may represent an erosion and downward calibration of previously held high human rights standards.

Chapter 5. Conclusions

5.1 Recommendations and Scope for Reform

This thesis has examined the development, implementation and administration of three particular executive mechanisms that have been termed counter-terrorist hybrid orders, in order to evaluate the implications of the mechanisms for, and ultimately their compatibility with, the right to a fair trial under IHRL. In light of the findings of the study, there are a number of opportunities for meaningful reform that could improve the substantive fairness and, more importantly for the purposes of this thesis, the procedural fairness of proceedings concerning the mechanisms, in order to ensure that the UK does not risk straying beyond the margins of permissible behaviour under IHRL. Moreover, as some European States have enacted similar counter-terrorist administrative powers, and others may be drawing inspiration from current UK practice, certain steps could be taken by those States in light of the UK's experience in order to avoid similar problems and issues.

First, in light of the legal framework pertaining to the right to a fair trial in the context of national security set out in Chapter 2, this thesis has argued that the criminal limb of the right to a fair trial should apply in proceedings concerning counter-terrorist hybrid orders. Whilst no domestic court nor the ECtHR has reached this conclusion, it could be argued that if the ECtHR was confronted with a case concerning one of the mechanisms explored in this thesis, it is likely that the Court would determine that the proceedings should be classified as criminal in nature. This assertion is in line with the substantial jurisprudence of the ECtHR on these matters,[1066] which points to such a conclusion for a number of reasons: counter-terrorist hybrid orders are imposed on the basis of allegations of terrorism-related or otherwise serious types of activity; they impose harsh restrictions and obligations upon subjects which are often more onerous than some forms of criminal punishment; they are imposed by the Secretary of State pursuant to her statutory powers and most significantly;

[1066] On which, see Chapter 2, section 2.2.

they provide for the possibility of strong criminal sanctions, including imprisonment, for any breach of the conditions. These combined factors indicate that the proceedings in which counter-terrorist hybrid orders are reviewed by the courts should be treated as the 'determination of a criminal charge' for the purposes of Article 6 of the ECHR, and therefore import the stronger fair trial guarantees required in criminal proceedings.

As such, to avoid any potential future clash between the ECtHR and the UK courts on this fundamental issue, Parliament could consider reforming the current design and administration of the various statutory regimes analysed in Chapter 3 to import the maximum set of fair trial guarantees espoused under Article 6 of the ECHR, subject to the permissible restrictions that may be invoked.

Accordingly, if the UK wishes to avoid the risk of straying beyond the margins of permissible conduct under IHRL, it should consider granting full rights of disclosure to individuals, including a full reasoned judgment, and it should not exclude the individuals from proceedings, although the press and public may be excluded from all or part of a trial on national security grounds. The Government would also still be able to invoke the implied limitations of some specific guarantees that underpin the right to a fair trial, provided that any restrictions adopted in order to achieve legitimate objectives such as the protection of national security or the rights of others are strictly necessary to achieve one or more of those aims, and that these restrictions do not impair the essence of the right. For example, should it be deemed necessary not to disclose certain evidence to the individual for national security reasons, it is conceivable that a Special Advocate may still be able to serve a purpose in such proceedings by being appointed to represent the interests of an accused during applications by the prosecution to withhold relevant unused material.[1067]

[1067] See Walker, 'Terrorism Prosecution in the United Kingdom' (n. 31) 253; *R v. H* [2004] UKHL 3, at 22; Metcalfe, 'Secret Evidence' (n. 99) paras 310-315. However, in *Al Rawi* (n. 719), the Supreme Court made it clear that there was no common law power to hold proceedings under CMP. On the rights of disclosure in criminal proceedings see text Chapter 2, section 2.3, text accompanying n. 229 and section 2.5.2.

Crucially, reflecting the inherently criminal nature of proceedings, the various counter-terrorist hybrid orders should only be imposed upon individuals when the Home Secretary is convinced, beyond reasonable doubt, that the individual is, or has been, involved in terrorist-related activity. It is worth recalling at this point that, despite the civil and non-terrorism related nature of ASBOs, the Court of Appeal in *McCann* held that the mechanisms should be implemented on the criminal burden of proof.[1068] Although the IRTL has suggested that the courts should be able to review the decisions of the SSHD to the standard of the 'balance of probabilities' in relation to TPIMs, rather than on the lesser judicial review standard as the situation currently stands,[1069] the courts should also be bound to apply the criminal burden of proof when reviewing the Home Secretary's decisions if the proceedings are indeed criminal in nature. Where relevant, all of these recommendations should also be implemented insofar as TEOs are concerned.

Such a conclusion may also have implications for other administrative counter-terrorist powers and non-terrorism-related executive powers that were briefly addressed earlier.[1070] The findings of this thesis may imply that other administrative powers should be fundamentally reformed in similar ways and that they should be considered as criminal in nature. In line with the jurisprudence of the ECtHR, this is especially relevant if such executive powers are imposed on the basis of allegations of serious activity; if they impose harsh restrictions and obligations; if they are imposed upon people by the Secretary of State; and if they provide for strong criminal sanctions for any breach. Whilst other administrative powers undoubtedly share some characteristics with the three mechanisms explored in this thesis, most are not concerned with activities as serious as terrorism. In addition, the restrictions and obligations that can be imposed upon individuals are generally not as onerous as those under counter-terrorist hybrid orders, or they are much more limited, and

[1068] See above, n. 634.
[1069] See Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) paras 3.1(d) & 3.8(b).
[1070] See Chapter 1, section 1.4.3, text accompanying ns. 83-91 and Chapter 3, section 3.1, text accompanying n. 456.

lastly, their manner of implementation and administration sets them apart from counter-terrorist hybrid orders which are immersed in secrecy due to the use of CMP.

Implementing the above recommendations would ensure that the principles of natural and open justice are respected, and that the relevant guarantees of the right to a fair trial under IHRL challenged by current practice are fully complied with, not least of all the right to a public trial, the right to an adversarial trial and the equality of arms, and the additional fair trial guarantees which must be adhered to in criminal proceedings.

However, it is clear that the UK courts do not attach as much significance to the distinction between criminal and civil proceedings as the ECtHR does, instead emphasising that the range of applicable fair trial guarantees can vary depending on the situation. In light of the case law discussed in this thesis, it is unambiguous that the UK courts, as well as the executive and legislature, view proceedings concerning counter-terrorist hybrid orders as civil in nature.

In that respect, although some efforts to mitigate and counter-balance the unfairness of proceedings concerning counter-terrorist hybrid orders have been made, most importantly with the requirement of minimum disclosure and the appointment of Special Advocates, more should be done. For example, the *de facto* ban on communication between subjects and their Special Advocates once the latter has seen the closed evidence could be relaxed somewhat, in order to allow some meaningful communication between the subject and their Advocate.[1071] Finally, the British legislature could fully accommodate the modest and more general recommendations of the IRTL insofar as TPIMs are concerned, in order to improve the fairness of existing practices to some extent.[1072]

[1071] This approach has also been suggested by the JCHR and the previous IRTL. See A. Carlile, 'Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005' (3 February 2011) 50; JCHR, *Counter–Terrorism Policy and Human Rights: 28 Days, Intercept and Post–Charge Questioning* (n. 482) para 205.
[1072] Anderson, 'Terrorism Prevention and Investigation Measures in 2014' (n. 553) ch 3 'Changes to the Regime'.

In light of the UK's response to the enduring problem of terror suspects who cannot be prosecuted or deported, this thesis has argued that the UK's current practice in relation to counter-terrorist hybrid orders strongly resembles the behaviour typically manifested by States enduring a 'prolonged emergency'. One could argue that the legal framework pertaining to counter-terrorism measures in the UK has progressively crystallised into a state of 'perpetual quasi-emergency'. The UK is acting at the margins of permissible conduct under IHRL and has, at least in the early years of the Control Order regime, occasionally acted beyond these limits, thereby eroding long-established fair trial guarantees usually associated with proceedings concerning alleged terrorist behaviour.

Whilst it could be argued that, as a measure of last resort, the UK Government should be more up front about the fairness of the mechanisms and formally derogate from certain aspects of Article 6 of the ECHR, such a drastic course of action would not accord with the general approach of subsequent UK governments which has been to reject the notion of the 'War on Terror' and the emergency paradigm.[1073] In fact, derogating from certain aspects of IHRL may be undesirable and ultimately detrimental to these objectives. The recent experience in France has provided strong evidence that exceptional measures advanced pursuant to a formal derogation can be applied on a large scale and normalised over time.[1074] For example, it is clear that France has imposed considerably more 'Assigned Residence Orders' in the space of two years than the total amount of the similar Control Order and TPIM mechanisms imposed by the SSHD in the UK since 2005.[1075] Demonstrating the potential consequences of derogations even further, the restrictions and

[1073] See Chapter 1, section 1.1, text accompanying ns. 28-31. See also the findings of the content analysis in Chapter 4, section 4.3.3.
[1074] See Chapter 2, section 2.7.1, text accompanying ns. 417-421. See also BBC News, 'France Approves Tough New Anti-terror Laws' (4 October 2017) at http://www.bbc.co.uk/news/world-europe-41493707.
[1075] Fenwick (n. 418) 625; Amnesty International, 'Upturned Lives: The Disproportionate Impact of France's State of Emergency' (n. 419) 6.

erosions of civil liberties in Turkey following the failed *coup d'état* in 2016 and subsequent derogations from IHRL have been disturbing and roundly criticised.[1076]

5.2 Future Developments and Scope for Further Research

This study has examined and evaluated a number of rapidly developing counter-terrorism and human rights issues that will remain of significant interest for legal scholars, civil liberties advocates and the public more broadly for many years. Accordingly, researchers should be mindful of a number of issues likely to transpire in the short-term and long-term which may have a significant bearing upon the findings of this study. In any case, these developments will undoubtedly present opportunities for further research into the themes explored in this study.

First, researchers should be attentive to the future disclosure of statistics concerning the implementation of counter-terrorist hybrid orders. As it seems clear that the UK's general counter-terrorism policy is grounded in law and priorities criminal prosecution, the use of TPIMs and TEOs should remain infrequently used powers. Nevertheless, it will be important to note how many TPIMs are imposed in the coming months and years and if the use of TEOs increases, since the introduction of the regime in February 2015.[1077] Additionally, it will be important to note how many applications are made to the High Court, Court of Appeal, Court of Session and Supreme Court under section 6 of the Justice and Security Act 2013 for a civil trial to be heard under CMP. These statistics will serve as useful evidence when critically analysing if exceptional measures relating to national security, particularly the authorisation and use of CMP, are indeed being normalised over time.

[1076] See K. Shaheen, 'One year after the failed coup in Turkey, the crackdown continues' *The Guardian* (14 July 2017). See Chapter 2, section 2.7.1, text accompanying ns. 422-423.
[1077] Under the CTS Act 2015, s. 52(5), Part One Chapter Two came into force on the day the Act was passed i.e. 12 February 2015.

Second, an appeal pending before the ECtHR, *Gulamhussein and Tariq v. UK*, represents the first time the Court will have to directly address the fairness of CMP under Article 6 of the ECHR.[1078] The case concerns the fairness of appeal proceedings heard under CMP relating to the withdrawal of government-issued security clearances. This appeal followed the revocation of the security clearances of two Home Office employees due to their links to individuals concerned with terrorism. The ECtHR has given notice of the applications to the British Government and put forward four questions to the parties. These include the issue of whether the civil limb of the right to a fair trial applied to the Security Vetting Appeal Tribunal, but most importantly, the question of whether the applicants had enjoyed a fair hearing in the determination of their civil rights and obligations.[1079] Moreover, the ECtHR questioned whether 'the principle of equality of arms; the right to an adversarial hearing; and the right to a reasoned judgment' were respected in the closed proceedings.[1080] The judgment of the ECtHR will undoubtedly build upon *A v. UK*,[1081] *I. R. and G. T v. UK*,[1082] and *K2 v. UK*,[1083] which considered the fairness of CMP, albeit through the lens of different human rights, and offer some invaluable insight into the compatibility of CMP with the more detailed and meticulous requirements of the right to a fair trial under Article 6 of the ECHR. Should the ECtHR criticise the practice and gradual expansion of CMP in the British legal system, it may be the case that history repeats itself, and that it takes a judgment from the European Court to compel the UK to rethink its approach to proceedings entailing national security concerns.

Third, in addition to the more immediate developments just mentioned, there are more long term implications of the themes explored in this thesis. In particular, there are obvious and entirely legitimate anxieties over the direction in which the right to a fair trial may be heading when national security concerns arise. Although civil proceedings can clearly be held *in camera* and *ex parte*, no criminal trial in the UK has ever been held completely in secret to

[1078] *Gulamhussein and Tariq v. UK* (n. 691).
[1079] ibid. Questions to the Parties Qs. 2 and 3.
[1080] ibid.
[1081] *A v. UK* (n. 485).
[1082] *I. R. and G. T v. UK* (n. 690).
[1083] *K2 v. UK* (n. 690).

the extent that the proceedings are held *in camera* and *ex parte* with the public and media excluded, in which the reporting of the trial is also prohibited in its entirety, and where the defendants' identities are withheld from the public. Such a scenario would represent the most accurate manifestation of what is popularly labelled a 'secret court'.[1084]

In 2014 the English and Welsh legal system came close to allowing the first 'secret trial' in modern history when it emerged that the Crown Prosecution Service (CPS) was pressuring the High Court to allow a criminal trial to proceed entirely in secret and for the defendants' identities to be anonymised. In the High Court, Nicol J authorised the CPS request, but following a legal challenge led by *The Guardian* newspaper, the Court of Appeal held that the identities of the defendants and some of the facts of the trial had to be made public.[1085] Despite this outcome, as legal practitioners and the public become more accustomed to the use of CMP in civil proceedings, the risks of such practices becoming 'normalised' and spreading to other areas of law remains a serious concern. This arguably demonstrates that the practice of CMP in civil proceedings is having a detrimental effect on the wider criminal justice system, one of the hallmarks of a prolonged emergency.[1086]

Fourth, the various counter-terrorist hybrid order regimes which have been the focus of this study are just some of the examples of contemporary counter-terrorism practices which have the underlying objectives of prevention and pre-emption. This particular counter-terrorism approach involves the apparent sidestepping of traditional post-crime, punitive action and the greater use of pre-crime, preventative approaches. In addition to the mechanisms explored in this study, a pre-crime and preventative approach is also manifested currently with the Government's Prevent Strategy which seeks to 'prevent people being drawn into

[1084] See for example O. Bowcott, 'What are Secret Courts and what do they mean for UK Justice?', *The Guardian* (14 June 2013); J. Shaw, 'Secret Courts: 8 Nightmare Scenarios Now Possible in Britain', *openDemocracyUK* (14 June 2013) at https://www.opendemocracy.net/ourkingdom/jo-shaw/secret-courts-8-nightmare-scenarios-now-possible-in-britain-0.

[1085] The case was formerly known as *R v. AB and CD*. However, following the decision of the Court of Appeal, the identities of the individuals were revealed and the case became *Guardian News and Media Ltd and others v. Erol Incedal and Mounir Rarmoul-Bouhadjar* [2014] EWCA Crim 1861, [2014] HRLR 28.

[1086] See Chapter 4, section 4.2, text accompanying ns. 852-859.

terrorism'.[1087] The Strategy was given a statutory footing under the CTS Act 2015, placing a duty upon specified public authorities to 'have due regard to the need to prevent people from being drawn into terrorism' in the exercise of their functions.[1088] The move has proven deeply controversial, not least of all for institutionalising the 'conveyor-belt' theory of radicalisation.[1089]

Going further, the Government's new Counter-Extremism Strategy and subsequent counter-extremism proposals mark a significant expansion of the Prevent Strategy.[1090] These counter-extremism proposals may risk straying into uncharted territory by criminalising 'thought-crime' if action can be taken against individuals who exhibit vague notions such as 'non-violent extremism'.[1091] Moreover, whether the objectives of counter-terrorism and counter-radicalisation policies actually end up being counter-productive in the sense that they contribute to the alienation of certain communities is a serious concern.

Finally, there is obvious scope for further content analysis into the role that the rhetoric of panic, threat and fear can play during the parliamentary debates leading to the enactment of counter-terrorist legislation. Although this form of socio-legal analysis clearly strays from traditional doctrinal legal analysis most familiar to legal scholars, this study has indicated that some content analysis can be useful, especially when critically analysing areas of law that dominate popular and media discourse and have a clear impact in society, as matters of counter-terrorism evidently can do. Other counter-terrorist legislation could be subjected to similar analysis, whilst it may be useful to analyse similar issues insofar as the media contribute to the rhetoric of panic, threat and fear. Going further, given the well-known

[1087] HM Government, *Prevent Strategy* (Cm 8092, June 2011). See B. Stanford & Y. Ahmed, 'The Prevent Strategy: The Human Rights Implications of the United Kingdom's Counter-Radicalisation Policy' (2016) 24 *Questions of International Law* 35.
[1088] CTS Act 2015, s. 26.
[1089] The conveyor-belt theory presupposes that 'terrorism is caused by the presence of extremist ideology' and therefore, we must 'intervene to stem the expression of extremist opinions and demand allegiance to British values'. See Claystone, 'A Decade Lost: Rethinking Radicalisation and Extremism' (January 2015) 7.
[1090] HM Government, *Counter-Extremism Strategy* (n. 1041).
[1091] R. Gleave & R. McNamara, 'Non-Violent Extremism: Some Questions about Laws and Limits', *UK Human Rights Blog* (22 May 2015) at http://ukhumanrightsblog.com/2015/05/22/non-violent-extremism-some-questions-about-laws-and-limits-robert-gleave-and-lawrence-mcnamara/.

influence of British counter-terrorism laws and policies, there is obvious potential to examine the similarities and differences, if any, that the role of rhetoric has in the legislative processes leading to the enactment of counter-terrorism laws in States such as Australia and Canada, and also more recently in Europe.

5.3 Final Remarks

Since 9/11, subsequent British Governments have demonstrated clear willingness to 'defend further up the field' in the struggle against terrorism,[1092] by going further back in the timeline of an individual's potential path to committing acts of terrorism in order to prevent that path being fully realised. Obviously, the further back in time a policy or law functions in the attempt to prevent terrorist acts from occurring, the broader the net of people who may be subjected to counter-terrorist measures becomes. Equally troubling, as the criminal burden of proof becomes harder to satisfy with mechanisms which are inherently pre-emptive in nature, the growth of a parallel justice system which circumvents the normal criminal process is a real cause for concern. The implications for IHRL are drastic, as standards previously held in high regard may be gradually eroded pursuant to the objective of protecting national security. Counter-terrorist hybrid order orders that are implemented in the civil courts but can involve criminal sanctions undoubtedly manifest this approach.

Going further, the UK's counter-extremism proposals may replicate these challenges and stretch them even further. Like the overly broad definitions underpinning counter-terrorist hybrid orders, the exceedingly wide notions of 'extremism' – and in particular 'non-violent extremism' – may play an integral role in the implementation of the proposed counter-extremism 'civil order regime'. The broad notions may create an even wider range of individuals who could be subjected to restrictive conditions without benefitting from the fair

[1092] Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (n. 41) 237.

trial guarantees usually associated with proceedings concerning conduct of serious criminal nature. Despite being deliberately framed as risk-averse administrative mechanisms, it is hard to dismiss fears that the growing use of preventative mechanisms explored in this study have the effect of 'criminalising' certain conduct, whilst simultaneously diminishing long-established human rights standards.

In light of the recent terrorist attacks in Europe and reports that terrorist plots are regularly thwarted by police and security services, the threat posed by terrorism is very real. However, the risks inherent in creeping and unacknowledged limitations of some essential fair trial guarantees cannot be underestimated. Whilst heavy-handed restrictions *may* be necessary, Governments need to be clear where they stand and meet their obligations under IHRL.

With regard to counter-terrorism hybrid orders, the invocation of the criminal limb to the right to a fair trial would be the desirable course of action which would provide a greater degree of procedural fairness to individuals. This might also accord more strongly with the general counter-terrorism policy of the UK which has emphasised the prioritisation of criminal prosecution. However, as it seems clear that such a significant reform is unlikely, a more realistic conclusion should be determined. Whilst the possibility of the UK derogating from certain aspects of the right to a fair trial may seem a viable option as a measure of last resort, recent experience in France has provided further evidence that exceptional counter-terrorism measures which are implemented on the basis of a formal derogation pursuant to a state of emergency can become normalised. As such, despite the concerns addressed in this thesis, the continued but minimal use of counter-terrorist hybrid orders which are fundamentally grounded in law may be a more desirable course of action than the use of emergency powers, which would necessitate a derogation from IHRL, and which may ultimately lead to procedures which are incompatible with human rights being normalised over time.

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Ravnsborg v. Sweden (App. no. 14220/88) ECtHR, 23 March 1994

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Sejdovic v. Italy (App. no. 56581/00) ECtHR [GC], 1 March 2006

Stanford v. United Kingdom (App. no. 16757/90) ECtHR, 23 February 1994

T v. Austria (App. no. 27783/95) ECtHR, 14 November 2000

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Al Rawi and others v. The Security Service [2011] UKSC 34

Attorney General v. Leveller Magazine [1979] AC 440

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Brown v. Stott [2003] 1 AC 681

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Murungaru v. Secretary of State for the Home Department [2008] EWCA 1015 (Civ)

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R v. Secretary of State for the Home Department ex parte. Doody et al [1994] 1 AC 531

R v. Gul [2013] UKSC 64

R v. H [2004] UKHL 3, [2004] 2 AC 134

R v. Horncastle and Others (2009) UKSC 14

R v. Lee Kun [1916] KB 337

R v. Legal Aid Board, Ex parte Kaim Todner (A Firm) [1998] 3 WLR 925, [1999] QB 966

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Secretary of State for the Home Department v. AM [2012] EWHC 1854 (Admin)

Secretary of State for the Home Department v. AN [2008] EWHC 372 (Admin)

Secretary of State for the Home Department v. AP [2010] UKSC 24

Secretary of State for the Home Department v. AT [2012] EWCA Civ 42

Secretary of State for the Home Department v. AY [2012] EWHC 2054 (Admin)

Secretary of State for the Home Department v. BF [2012] EWHC 1718 (Admin)

Secretary of State for the Home Department v. BM [2011] EWCA Civ 366

Secretary of State for the Home Department v. BM [2012] EWHC 714 (Admin)

Secretary of State for the Home Department v. CC and CF [2012] EWHC 2837 (Admin)

Secretary of State for the Home Department v. CD [2012] EWHC 3026 (Admin)

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c. Israel

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APPENDIX I: Enquiry Concerning Government Counter-Extremism Proposals

Enquiry Re: Clarification on the "Counter-Extremism and Safeguarding Bill"
Ben Stanford
public.enquiries@homeoffice.gsi.gov.uk

Ben Stanford
Rights Watch (UK)

19 May 2016

Dear Rt Hon Theresa May MP,

My name is Ben Stanford and I am a Legal Fellow at Rights Watch (UK), an organisation working to hold Government to account and build upon lessons from the conflict in Northern Ireland.

The 2016 Queen's Speech delivered on 18 May outlined Government proposals for a "Counter-Extremism and Safeguarding Bill" which would include the "introduction of a new civil order regime to restrict extremist activity, following consultation".

This would appear to overlap with some of the content of the previous "Counter-Extremism Bill", which proposed to create a variety of executive orders including Banning Orders, Closure Orders and Extremism Disruption Orders.

I would be very grateful if you could provide some clarification over the nature of the proposed "new civil order regime" under the Counter-Extremism and Safeguarding Bill.

More specifically, will this new power consolidate the previously proposed trio of "Orders" outlined in the Counter-Extremism Bill into one overarching and all-encompassing mechanism? Will the new civil order be targeted at individuals, institutions, or both? Will the new civil order regime be implemented by the Home Secretary, subject to court approval, under a similar procedure to Control Orders in the past, and now in relation to Terrorism Prevention and Investigation Measures (TPIMs) and Temporary Exclusion Orders (TEOs)? In other words, will the power be implemented on the basis of a reasonable suspicion/belief, or on the balance of probabilities, that an individual or institution is engaged in extremism-related activity, and will the application to a court be heard under closed material procedures? Finally, will the new civil order be implemented in the civil law, but with the possibility of criminal sanctions for any breach of its conditions?

I look forward to hearing from you.

Yours faithfully,

Ben Stanford.

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Mr Ben Stanford
bstanford@rwuk.org

Reference: T5799/16

Dear Mr Stanford,

Thank you for your e-mail of 19 May 2016 about the proposed civil order regime announced as part of the Counter-Extremism and Safeguarding Bill in the Queen's speech 18 May 2016.

The purpose of the Counter-Extremism and Safeguarding Bill is to provide stronger powers to enable the Government and law enforcement agencies to protect the public against the most dangerous extremists and to ensure that we have a full range of powers to deal with extremism.

Prior to introducing this legislation to Parliament we will consult widely on the proposed new civil order regime and we would welcome any contribution Rights Watch (UK) might make to that consultation.

As I am sure you understand, it would be inappropriate for me to comment on specific details of the civil order regime prior to that consultation.

Yours sincerely

S. Quarrell

Email: Public.Enquiries@homeoffice.gsi.gov.uk

APPENDIX II: Content Analysis in Relation to the Rhetoric of Panic, Threat and Fear in Legislative Processes

Summary of Nvivo Research

As mentioned in the Methodological Framework in Chapter 1, section 1.5, some content analysis was undertaken via Nvivo (v. 11) for the purposes of this thesis. This Appendix builds upon the Methodological Framework in Chapter 1 which explained why the analysis was necessary, and the results of the analysis which were displayed and analysed in Chapter 4, section 4.4.3. Moreover, this Appendix explains and evidences how the content analysis was actually carried out. The sources used were the second readings and committee stages from both Houses of Parliament pertaining to the four identified Bills of Parliament: the Prevention of Terrorism (PT) Bill; the Terrorism Prevention and Investigation Measures (TPIM) Bill; the Justice and Security (JS) Bill; and the Counter-Terrorism and Security (CTS) Bill. The various readings of each Bill were manually transposed into unique documents before being imported as unique sources into a new project on Nvivo. Deliberately excluded from the sources were the various divisions in which MPs names were listed when casting votes and the statements of committee membership. The sources were as follows:

Bill	House	Stage	Date	Hansard References	Word Length
PT	Commons	Second Reading	23 February 2005	Vol. 431 Cols. 333-448	56,727
PT	Commons	Committee	28 February 2005	Vol. 431 Cols. 663-768	52,871
PT	Lords	Second Reading	1 March 2005	Vol. 670 Cols. 116-219	57,061
PT	Lords	Committee	3 & 7 March 2005	Vol. 670 Cols. 359-383, 398-464, 482-556 & 568-616	108,590
PT	**Commons & Lords**	**Second Readings & Committee Debates**			**275,249**
TPIM	Commons	Second Reading	7 June 2011	Vol. 529 Cols. 69-130	36,048
TPIM	Commons	Committee	21, 23, 28, & 30 June 2011; 5 July 2011	Cols. 1-28 & 29-52, 53-78 & 79-118, 119-162 & 163-206, 207-230 & 231-260, 261-302 & 303-314	157,466

TPIM	Lords	Second Reading	5 October 2011	Vol. 730 Cols. 1133-1203	39,770
TPIM	Lords	Committee	19 October 2011; 1 November 2011	Vol. 731 Cols. 290-351 & 1121-1133	40,014
TPIM	**Commons & Lords**	**Second Readings & Committee Debates**			**273,298**
JS	Commons	Second Reading	18 December 2012	Vol. 555 Cols. 713-805	51,629
JS	Commons	Committee	29 & 31 January 2013; 5 & 7 Feburary 2013	Cols. 1-38 & 39-80, 81-106 & 107-156, 157-200 & 201-248, 249-276 & 277-298	151,463
JS	Lords	Second Reading	19 June 2012	Vol. 737 Cols. 1659-1697 & 1709-1758	48,374
JS	Lords	Committee	9, 11, 17 & 23 July 2012	Vol. 738 Cols. 910-977, 995-1018, 1161-1208, 1223-1242; Vol. 739 Cols. 119-180, 200-222, 488-562 & 579-592	182,605
JS	**Commons & Lords**	**Second Readings & Committee Debates**			**434,071**
CTS	Commons	Second Reading	2 December 2014	Vol. 589 Cols. 207-274	37,178
CTS	Commons	Committee	9, 15 & 16 December 2014	Vol. 589 Cols. 784-838, 1173-1234 & 1305-1373	95,140
CTS	Lords	Second Reading	13 January 2015	Vol. 758 Cols. 661-772	63,189
CTS	Lords	Committee	20, 26 & 28 January 2015	Vol. 758 Cols. 1207-1278, 1293-1318; Vol. 759 Cols. 12-75, 90-100 & 205-318	154,565
CTS	**Commons & Lords**	**Second Readings & Committee Debates**			**350,072**

Query 1: Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Four Bills

The purpose of this query was to assess which words featured most prominently in the various parliamentary debates. The word frequency tool within the Nvivo Query Wizard was used to identify the 30 most common words of five characters or more in each debate, including stemmed words. These results are displayed in full in Tables I-IV below, whilst Figures I-IV in Chapter 4, section 4.4.3, have condensed these results for ease of reference and analysis. Evidence of these word frequency searches is provided below.

Table I: Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Prevention of Terrorism Bill

The Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Prevention of Terrorism Bill							
Second Reading (House of Commons)		**Committee Stage (House of Commons)**		**Second Reading (House of Lords)**		**Committee Stage (House of Lords)**	
Word	**Count**	**Word**	**Count**	**Word**	**Count**	**Word**	**Count**
right	316	secretary	403	order	329	noble	926
secretary	304	order	367	governments	256	amendments	874
orders	285	right	250	noble	237	order	850
control	194	amendments	235	secretary	194	court	474
houses	187	courts	197	right	187	controls	417
member	187	member	197	terrorism	174	secretary	384
governments	163	clause	194	lords	161	right	315
points	156	point	180	liberty	150	learned	314
powers	152	judge	166	terrorist	146	derogation	304
people	151	liberty	158	controls	144	states	278
friend	144	derogation	153	derogation	143	government	277
court	140	controlled	152	court	142	committee	226
evidence	121	friend	150	judge	139	person	224
issue	120	house	140	houses	135	matter	219
security	116	committee	121	evidence	130	whether	219
whether	114	state'	118	powers	128	relation	211
gentleman	107	governments	114	process	121	column	210
judicial	104	debate	111	security	117	clause	208
column	103	process	111	state	114	points	199
question	99	people	110	people	114	friend	196
terrorism	97	clarke	102	threats	106	reasons	193
terrorist	95	column	98	column	104	think	190
liberty	93	matter	96	place	98	question	186
derogation	92	first	96	matter	91	falconer	172
process	91	different	88	judicial	85	thoroton	172
decision	90	accept	85	decision	82	issue	169
different	90	whether	85	legislation	82	agreed	167
debate	89	place	83	whether	80	scotland	160
considering	88	powers	82	country	75	baroness	158
judge	86	issue	80	reasons	73	ruling	156

Table II: Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Terrorism Prevention and Investigation Measures Bill

The Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Terrorism Prevention and Investigation Measures Bill							
Second Reading (House of Commons)		**Committee Stage (House of Commons)**		**Second Reading (House of Lords)**		**Committee Stage (House of Lords)**	
Word	**Count**	**Word**	**Count**	**Word**	**Count**	**Word**	**Count**
orders	230	order	731	noble	236	amendments	324
control	219	right	678	orders	230	noble	314
right	164	controls	610	control	197	order	183
people	145	secretary	582	secretary	133	secretary	179
member	134	member	547	governments	127	measures	159
measures	113	amendments	521	right	123	court	150
secretary	104	policing	494	individual	104	state	148
terrorism	104	point	489	debate	95	individual	141
governments	103	measures	486	courts	94	clause	129
security	99	ministers	479	measures	93	lords	118
individual	94	state’	469	terrorism	93	government	104
terrorist	87	clauses	454	powers	88	control	100
tpims	77	committee	441	security	88	notice	95
liberty	69	people	407	public	79	powers	95
community	69	number	388	house	78	reasonably	92
issues	69	individual	377	states	78	terrorism	91
evidence	68	security	371	legislative	73	rights	90
powers	67	evidence	363	friend	72	imposed	88
house	62	issues	334	lords	72	requirement	88
column	61	governments	331	ministers	72	friend	84
friend	61	terrorism	321	evident	71	provisions	83
system	60	regime	309	terrorist	70	decision	82
place	59	court’	303	column	70	ministers	82
prosecutions	58	column	295	review	67	committee	81
threats	57	might	289	parliament	66	baroness	79
protect	57	think	284	liberties	65	relatively	77
years’	57	friend	273	people	64	review	76
legislation	56	relatively	273	point	61	points	74
regime	56	gentleman	264	imposed	60	column	74
court	55	review	257	protect	60	provides	71

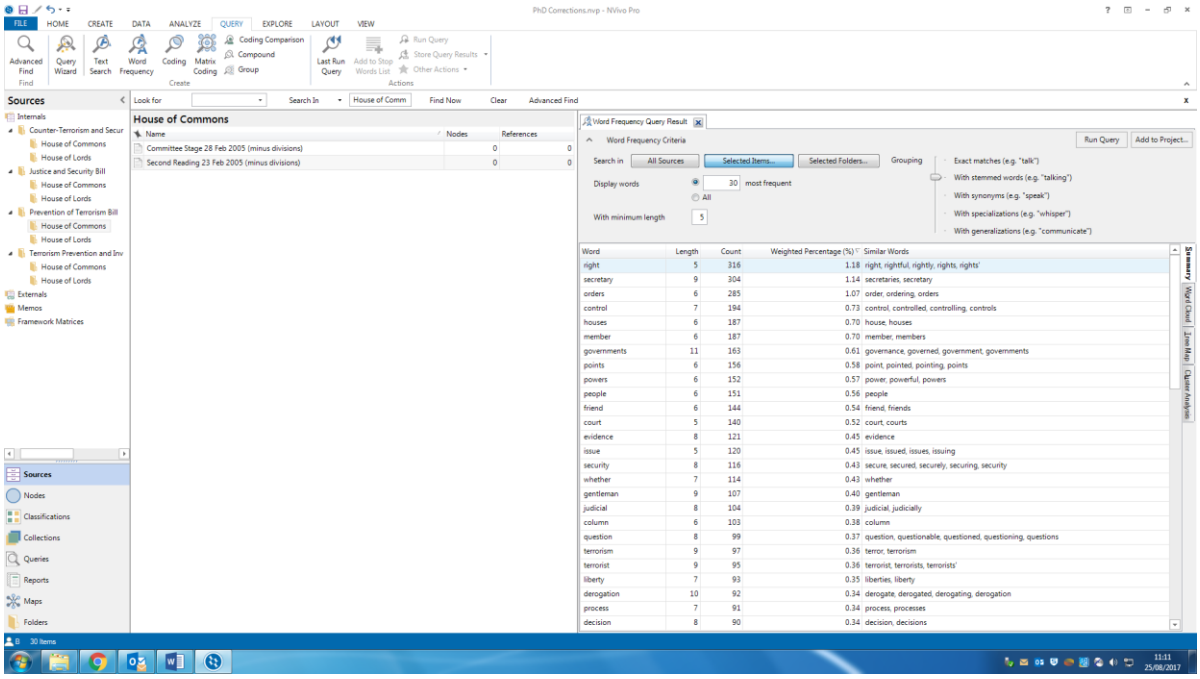
Table III: Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Justice and Security Bill

The Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Justice and Security Bill							
Second Reading (House of Commons)		**Committee Stage (House of Commons)**		**Second Reading (House of Lords)**		**Committee Stage (House of Lords)**	
Word	**Count**	**Word**	**Count**	**Word**	**Count**	**Word**	**Count**
right	282	amendments	1220	governments	267	noble	1422
governments	255	committee	917	noble	244	amendments	1179
committee	222	governments	817	security	232	committees	991
security	216	informed	599	committee	220	security	821
material	197	member	546	courts	204	material	715
courts'	193	material	519	material	198	governments	649
cases	178	ministers	517	intelligence	186	court	584
member	177	clause	507	informed	175	proceedings	549
closed	172	security	497	interest	166	judging	522
justice	148	courts	474	public	163	nations	506
evidence	139	proceedings	420	judge	146	informed	492
friend	135	points	392	evidence	127	public	478
intelligence	131	number	384	justice	122	lords	453
judge	129	party	337	cases	119	closed	426
informers	128	right	333	disclosure	118	ministers	417
houses	126	public	324	procedures	118	friend	417
ministers	126	states	314	right	110	interests	385
nations	125	national	313	national	108	states	372
procedures	113	issue	303	states	106	procedures	366
proceedings	113	intelligence	300	whether	102	points	360
agencies	109	interests	290	ministers	99	evidence	356
point	108	house	289	column	87	intelligence	351
place	104	matter	288	closed	84	clause	348
public	102	column	281	principle	84	whether	343
states	98	evidence	267	sensitive	84	right	336
principle	93	important	262	agencies	80	advocate	329
think	93	whether	259	house	77	column	329
interest	93	provide	257	lords	77	matter	322
column	91	report	257	proceedings	76	issue	320
issues	91	think	252	importer	75	disclosure	310

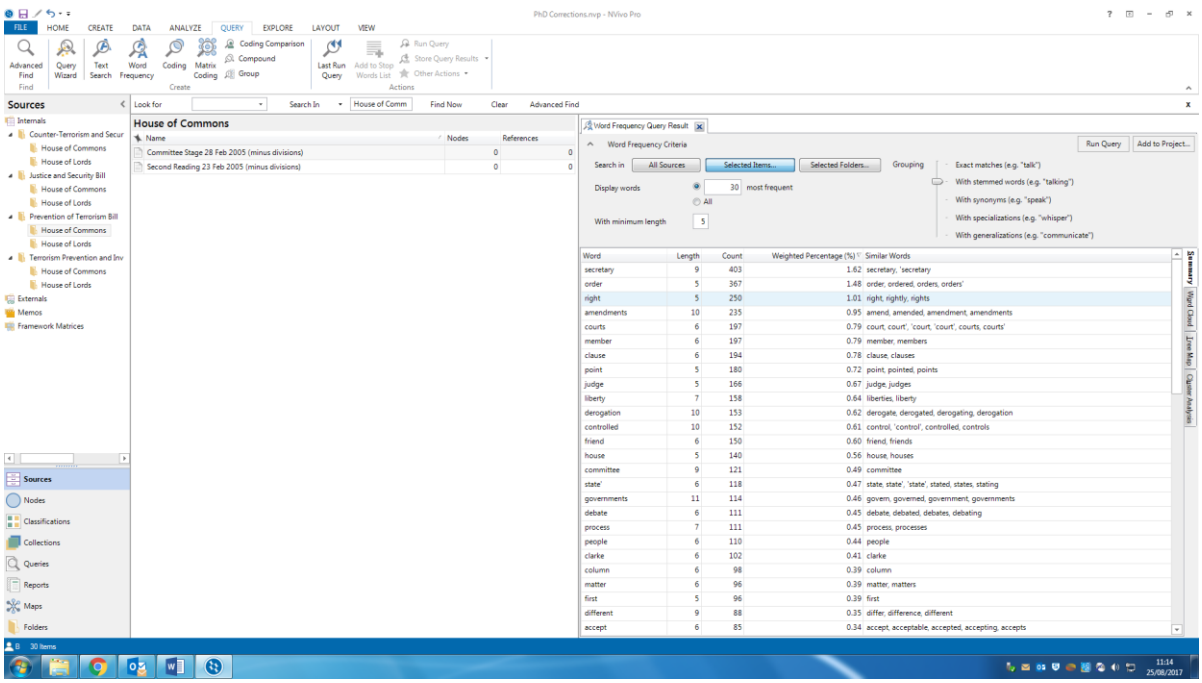
Table IV: Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Counter-Terrorism and Security Bill

The Distribution of Keywords in the Second Reading and Committee Stage Debates Pertaining to the Counter-Terrorism and Security Bill							
Second Reading (House of Commons)		**Committee Stage (House of Commons)**		**Second Reading (House of Lords)**		**Committee Stage (House of Lords)**	
Word	**Count**	**Word**	**Count**	**Word**	**Count**	**Word**	**Count**
right	222	right	367	noble	266	amendments	1068
people	175	individual	341	government	201	noble	961
secretary	133	clause	328	people	181	governments	441
member	132	amendments	288	terrorism	178	powers	406
governments	115	terrorism	279	powers	176	lords	397
terrorism	110	member	268	security	162	point	375
friend	105	people	267	right	151	clause	356
community	103	secretary	255	minister	132	terrorism	350
powers	100	governments	254	legislative	127	issue	349
country	96	ministers	246	community	126	individual	348
issue	85	order	244	housing	123	ministers	335
orders	83	issue	231	terrorist	116	baroness	330
returns	80	power	228	returns	113	friend	324
security	80	community	215	column	111	university	317
house	79	states	207	country	111	states	314
points	77	provide	206	committee	108	review	307
prevent	75	court	203	prevent	105	secretary	294
counter	72	point	201	issue	103	people	291
measures	71	relation	189	lords	99	order	286
threats	69	column	184	threats	97	column	282
important	66	prevent	177	think	97	legislative	278
column	64	security	171	measures	96	think	269
ensure	60	measures	157	policing	94	reasons	267
legislation	57	returns	149	order	92	provide	264
things	56	informed	147	reviewer	92	relation	264
committee	56	important	147	individual	89	whether	260
individual	55	review	143	however	88	community	256
place	54	place	137	debate	88	authorities	254
differently	51	required	136	concerned	87	right	246
response	51	legislative	135	proposed	86	committees	243

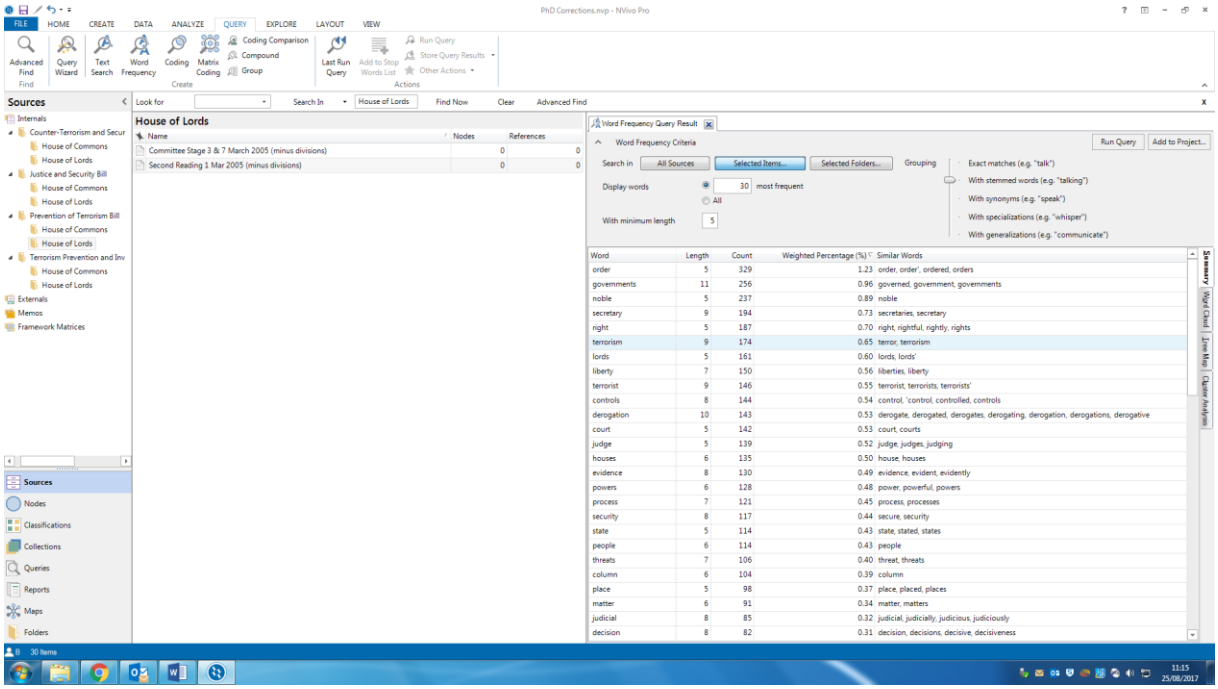
Prevention of Terrorism Bill (House of Commons Second Reading)



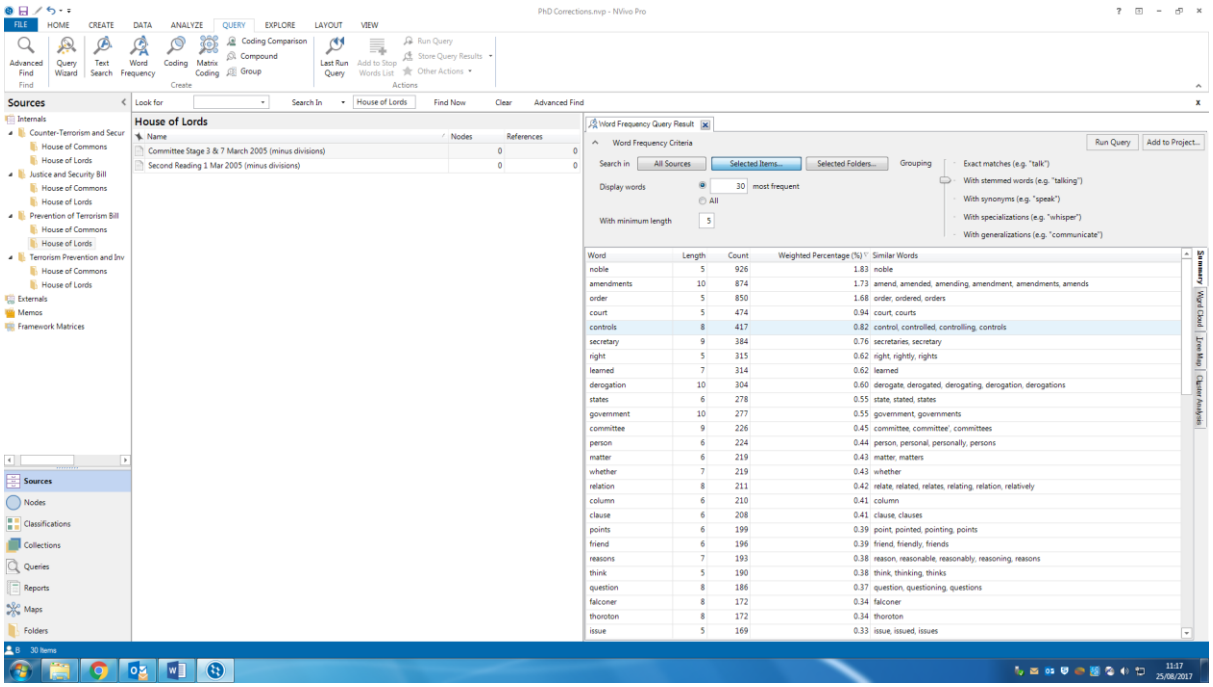
Prevention of Terrorism Bill (House of Commons Committee Stage)



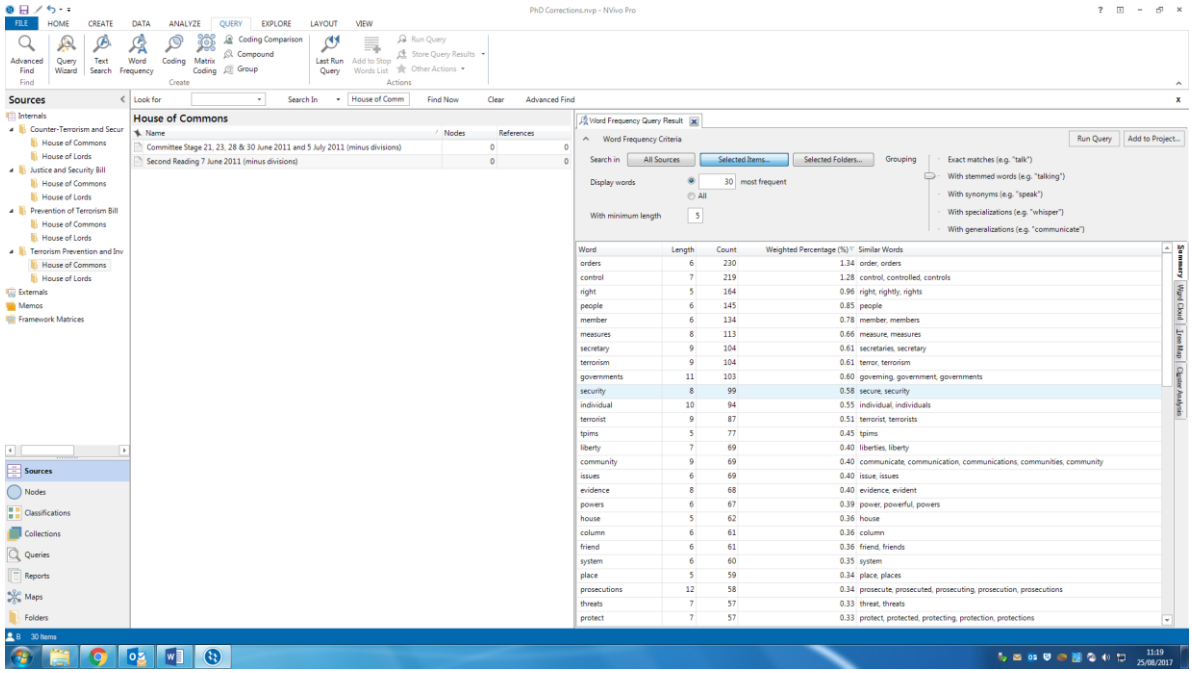
Prevention of Terrorism Bill (House of Lord Second Reading)



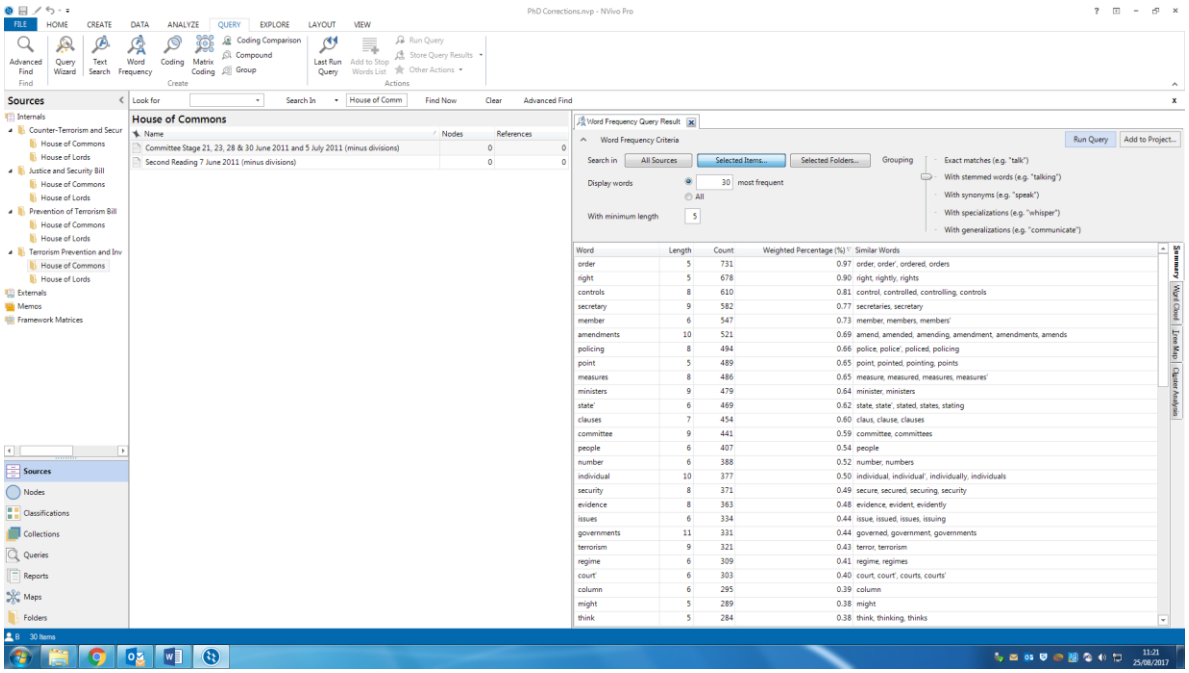
Prevention of Terrorism Bill (House of Lords Committee Stage)



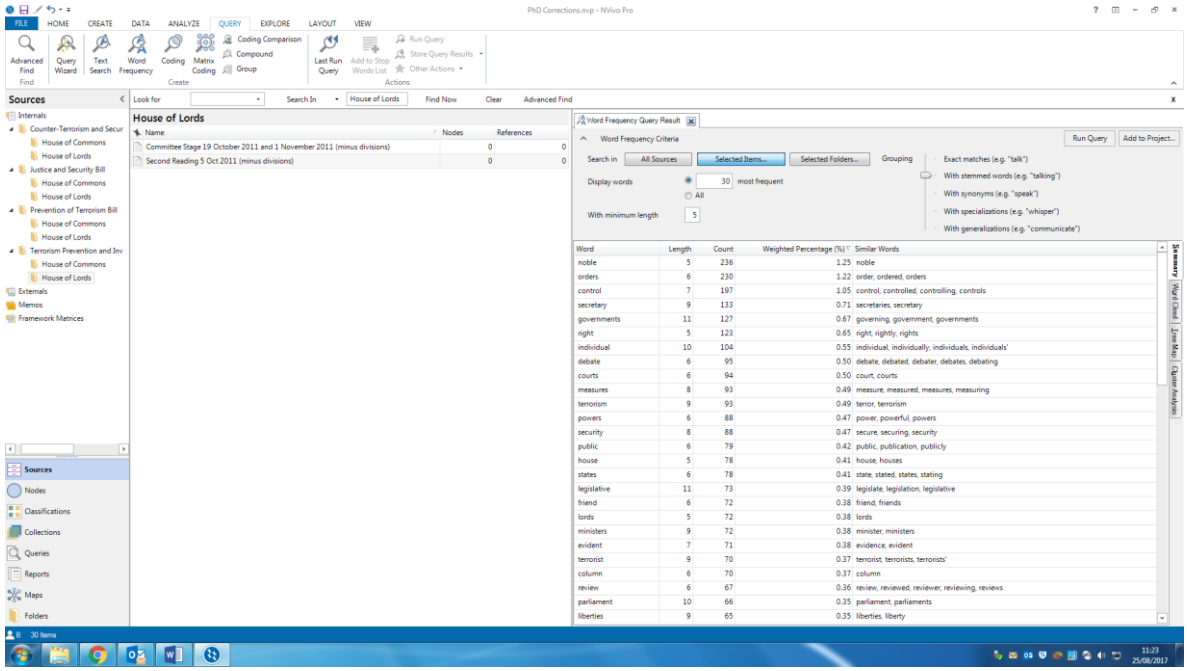
Terrorism Prevention and Investigation Measures Bill (House of Commons Second Reading)



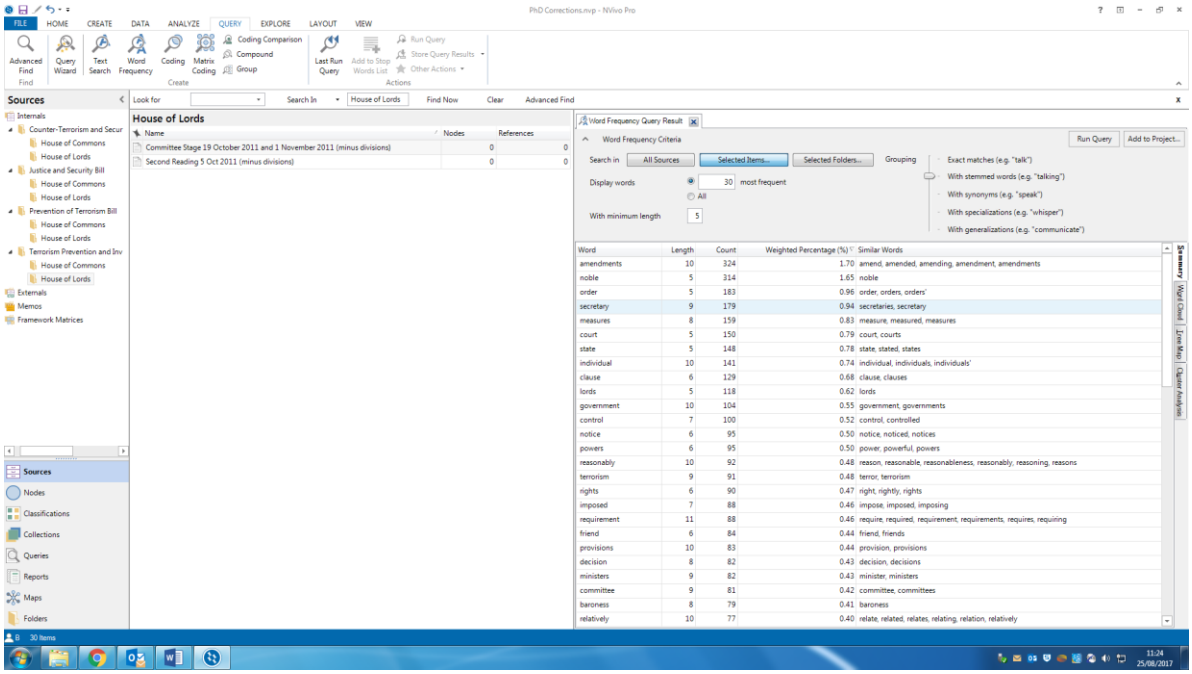
Terrorism Prevention and Investigation Measures Bill (House of Commons Committee Stage)



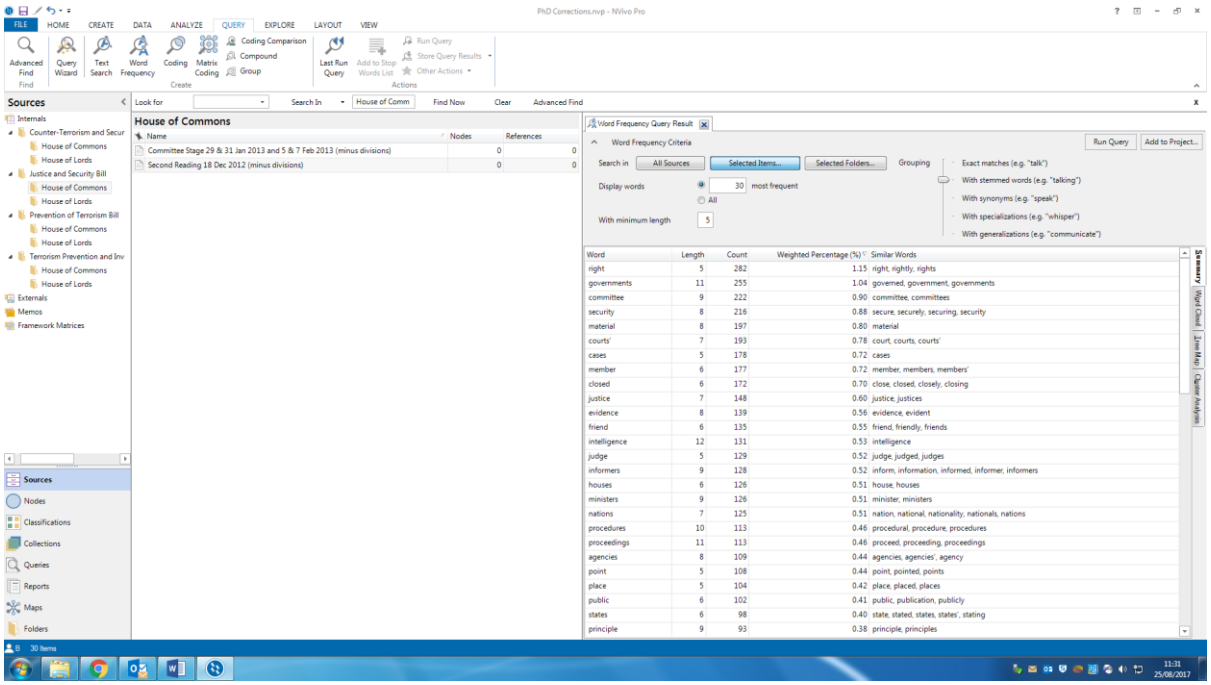
Terrorism Prevention and Investigation Measures Bill (House of Lords Second Reading)



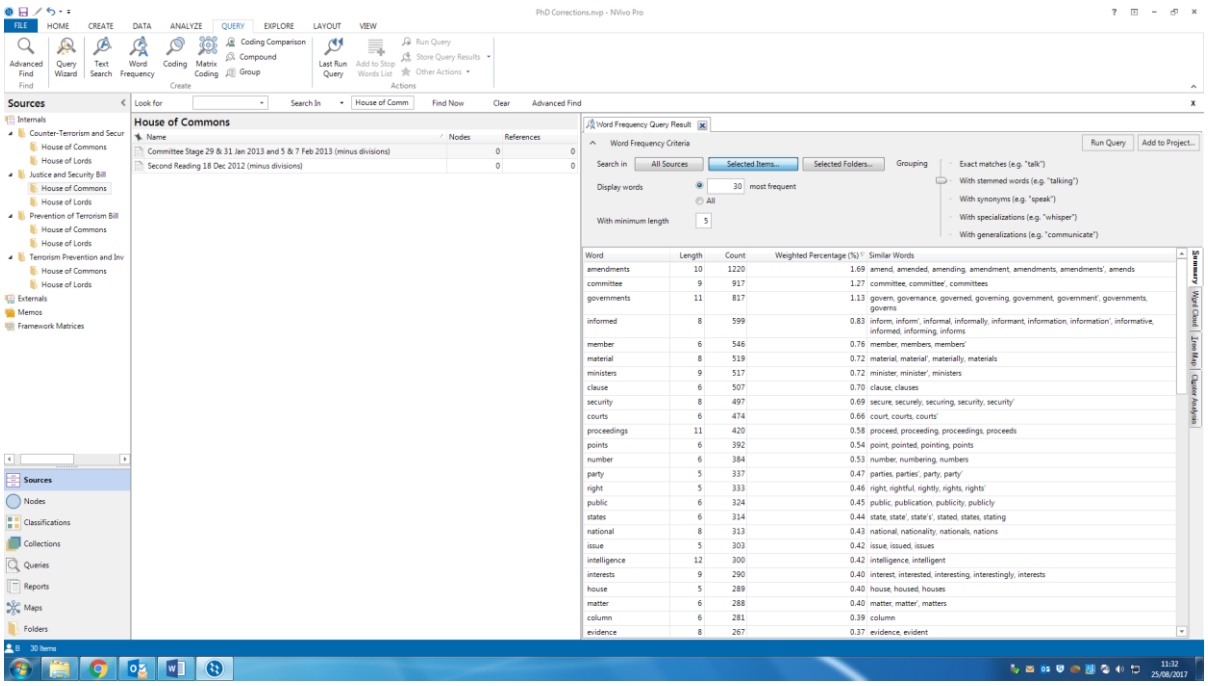
Terrorism Prevention and Investigation Measures Bill (House of Lords Committee Stage)



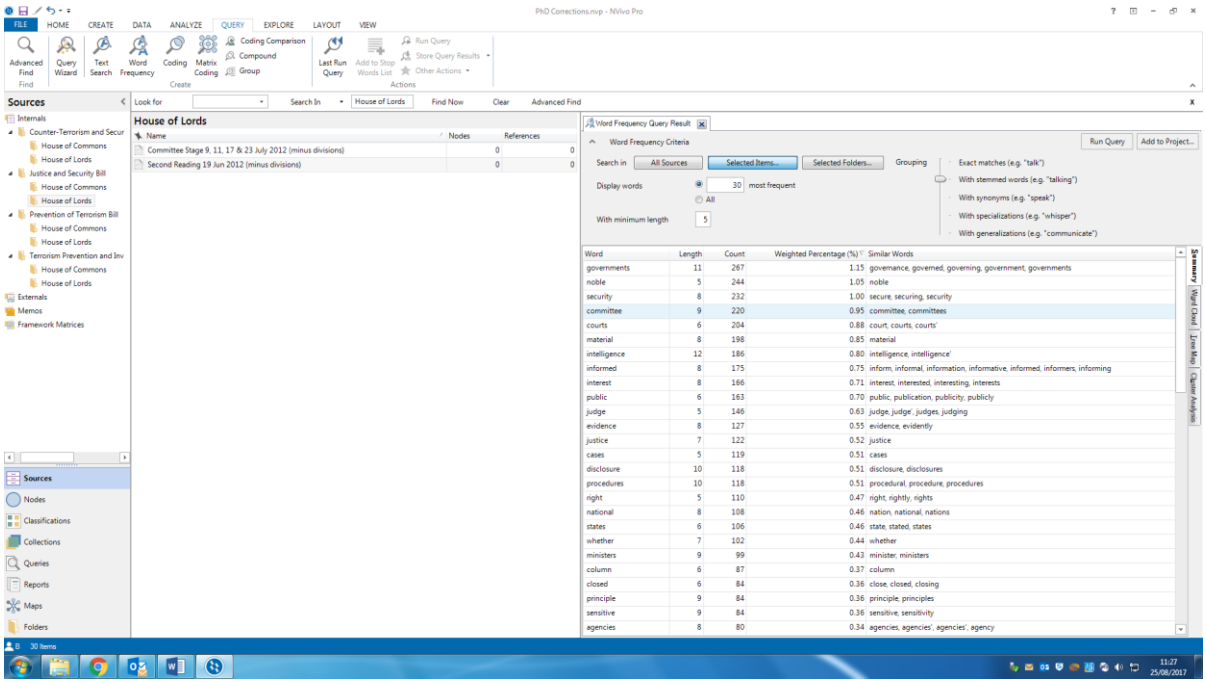
Justice and Security Bill (House of Commons Second Reading)



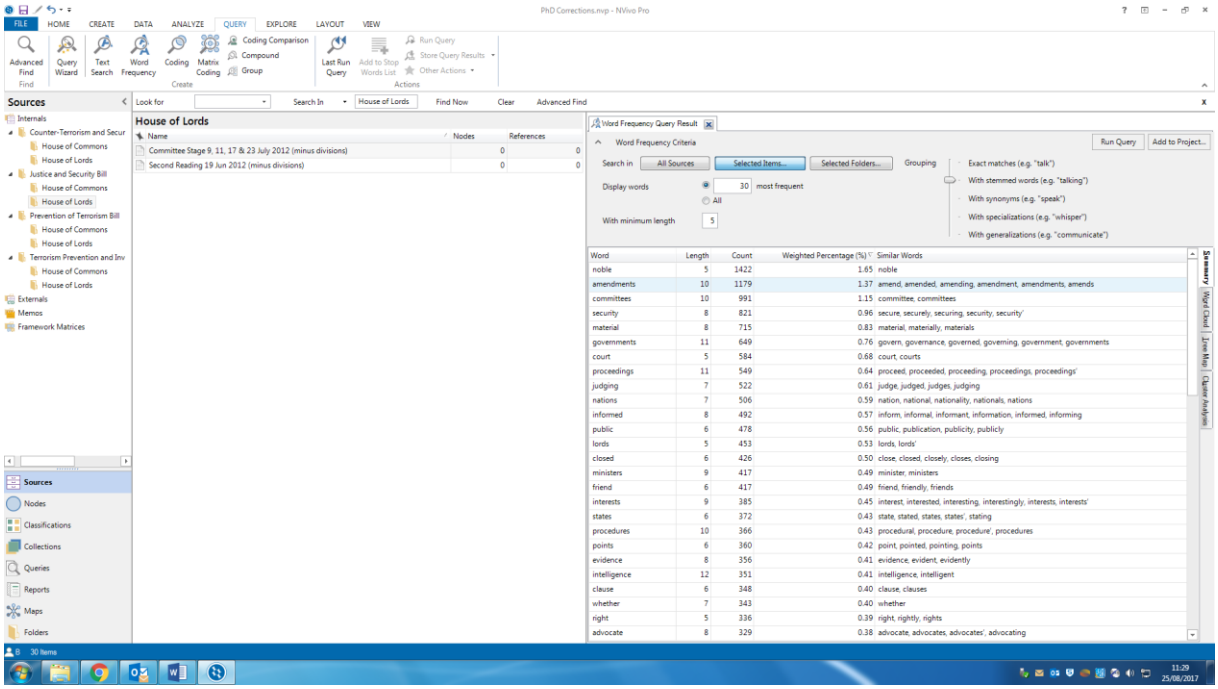
Justice and Security Bill (House of Commons Committee Stage)



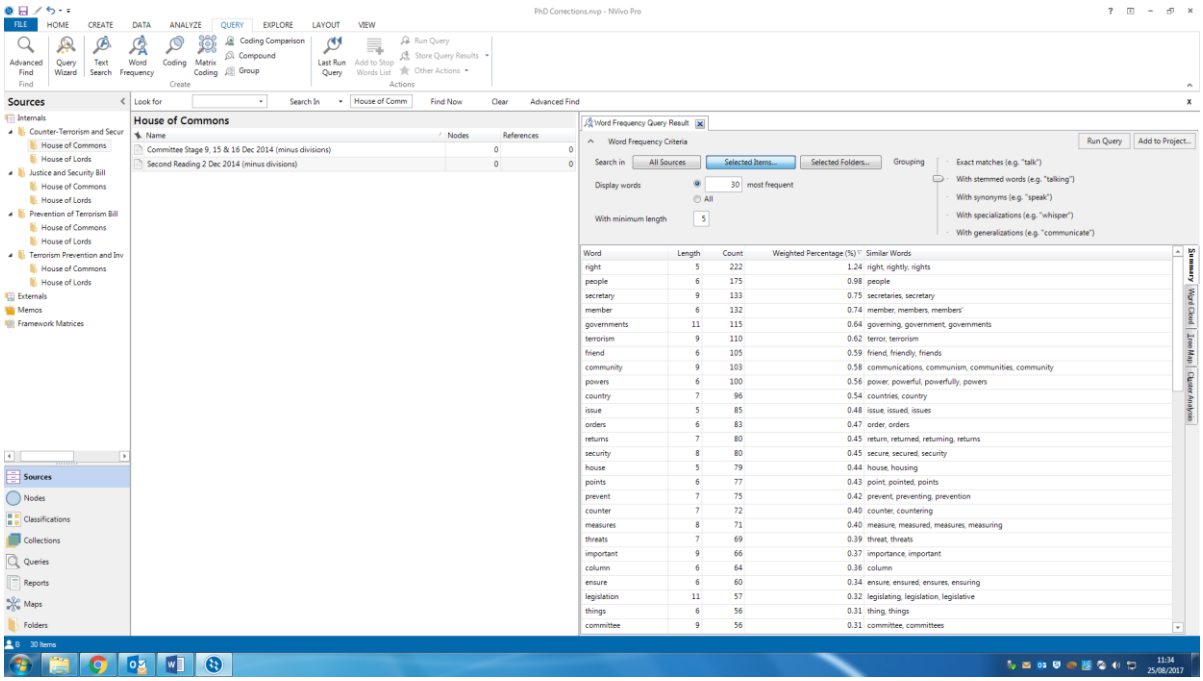
Justice and Security Bill (House of Lords Second Reading)



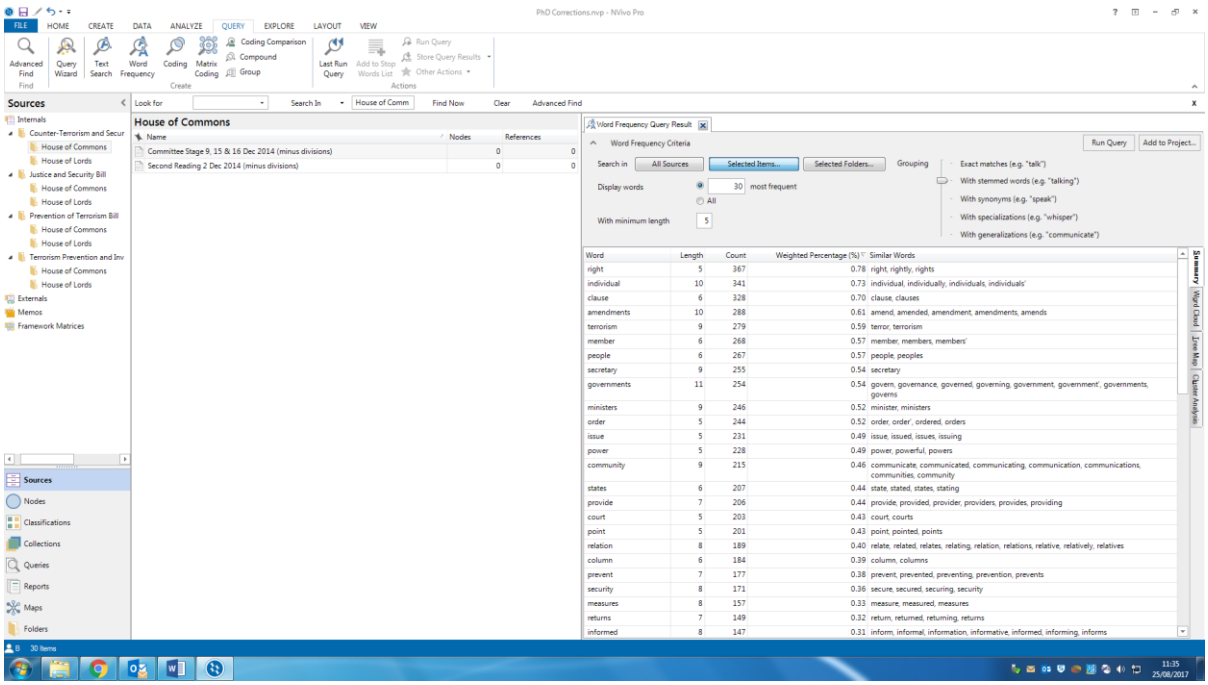
Justice and Security Bill (House of Lords Committee Stage)



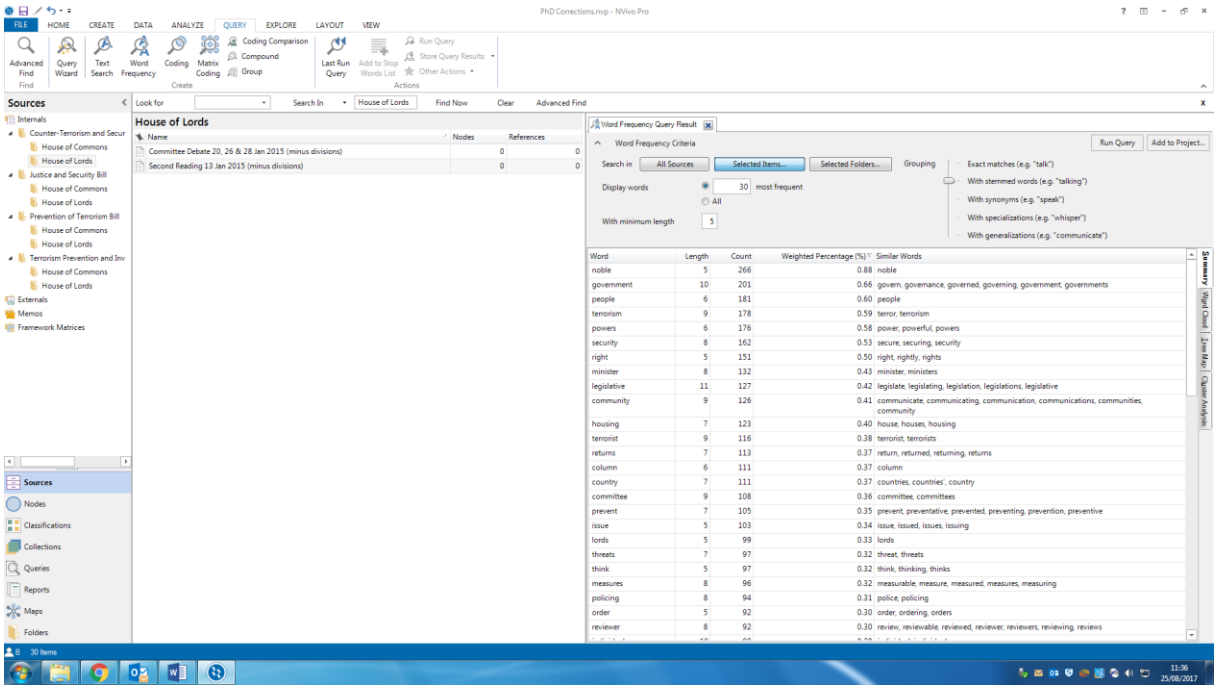
Counter-Terrorism and Security Bill (House of Commons Second Reading)



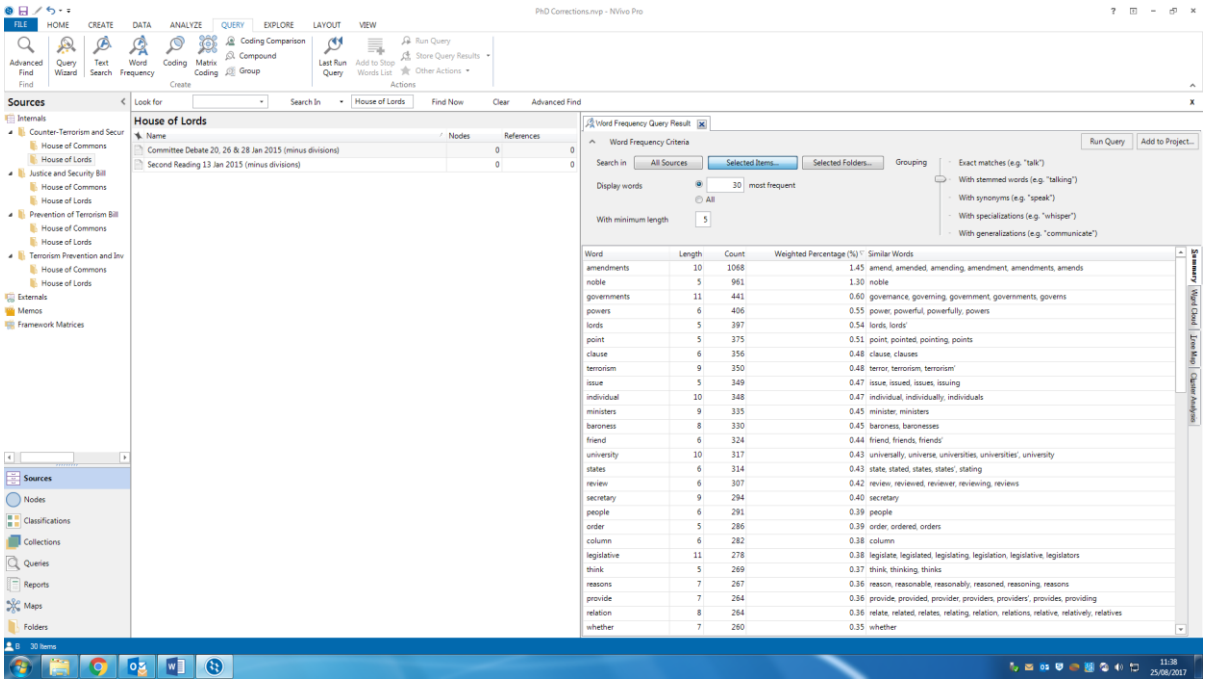
Counter-Terrorism and Security Bill (House of Commons Committee Stage)



Counter-Terrorism and Security Bill (House of Lords Second Reading)



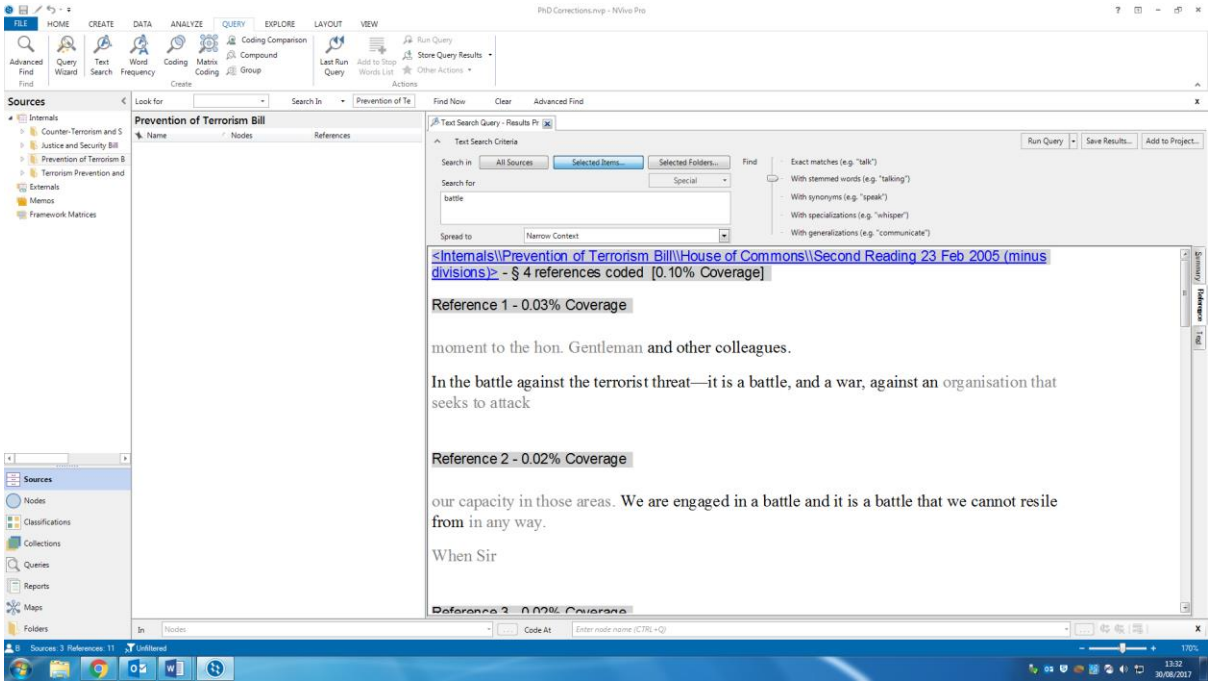
Counter-Terrorism and Security Bill (House of Lords Committee Stage)

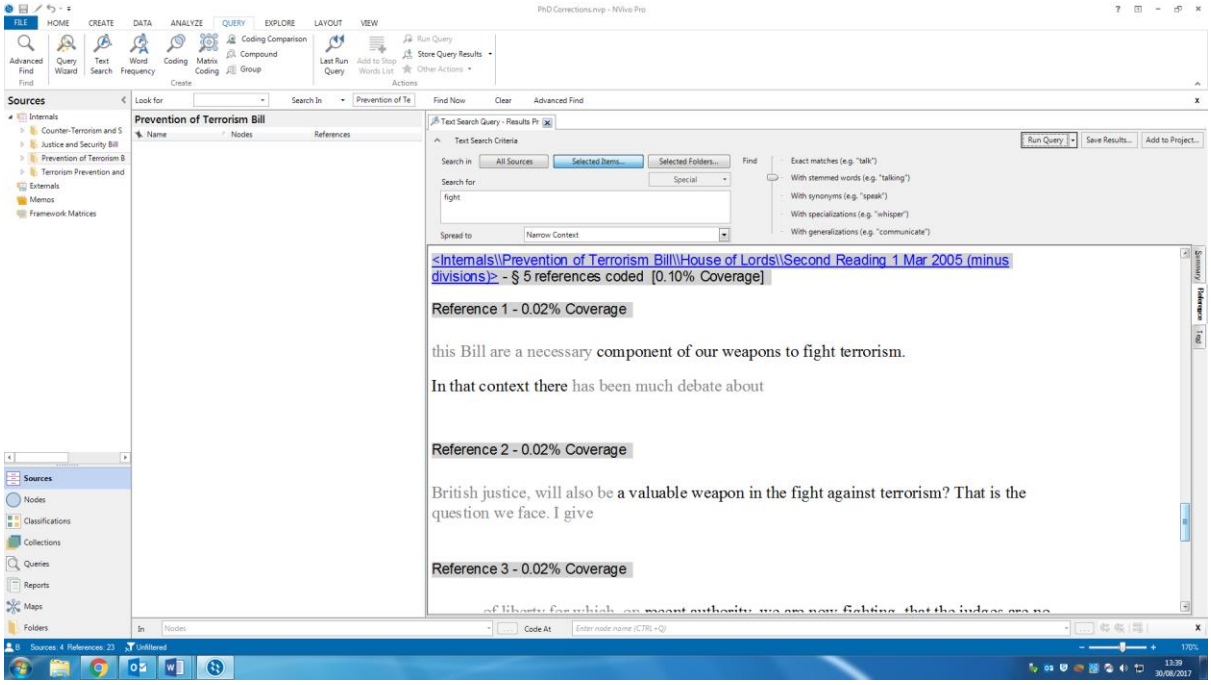


Query 2: The Adversarial Nature of Counter-Terrorism Efforts

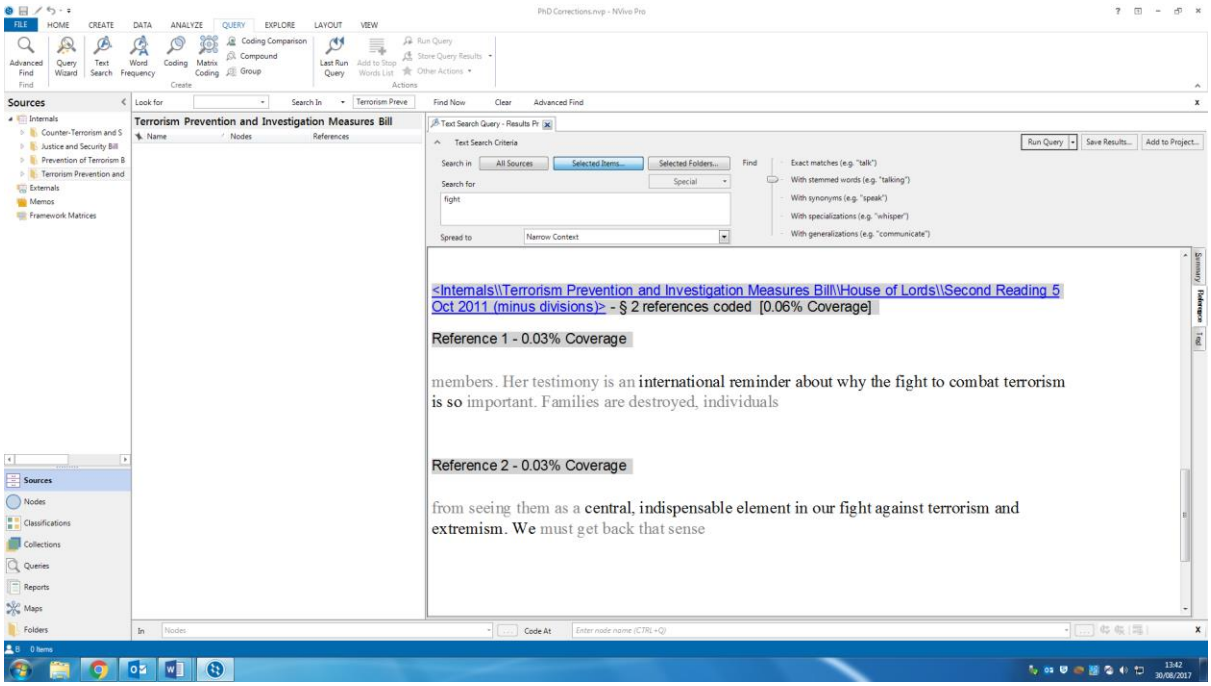
In light of the findings of Query 1, the purpose of Query 2 was to further analyse how the 'nature' of counter-terrorism efforts were perceived and described. The text search tool within the Nvivo Query Wizard was used to analyse how often the notions of 'battle', 'campaign', 'conflict', 'fight', 'struggle' and 'war', and stemmed words were used to describe the efforts to counter terrorism. When conducting the text search, the results were displayed in broad context so as to manually exclude irrelevant references, before transposing the results into a chart for the purpose of contrasting and comparing the results. Illustrative examples of these searches are included below and the results were transposed into Figure V in Chapter 4, section 4.4.3.

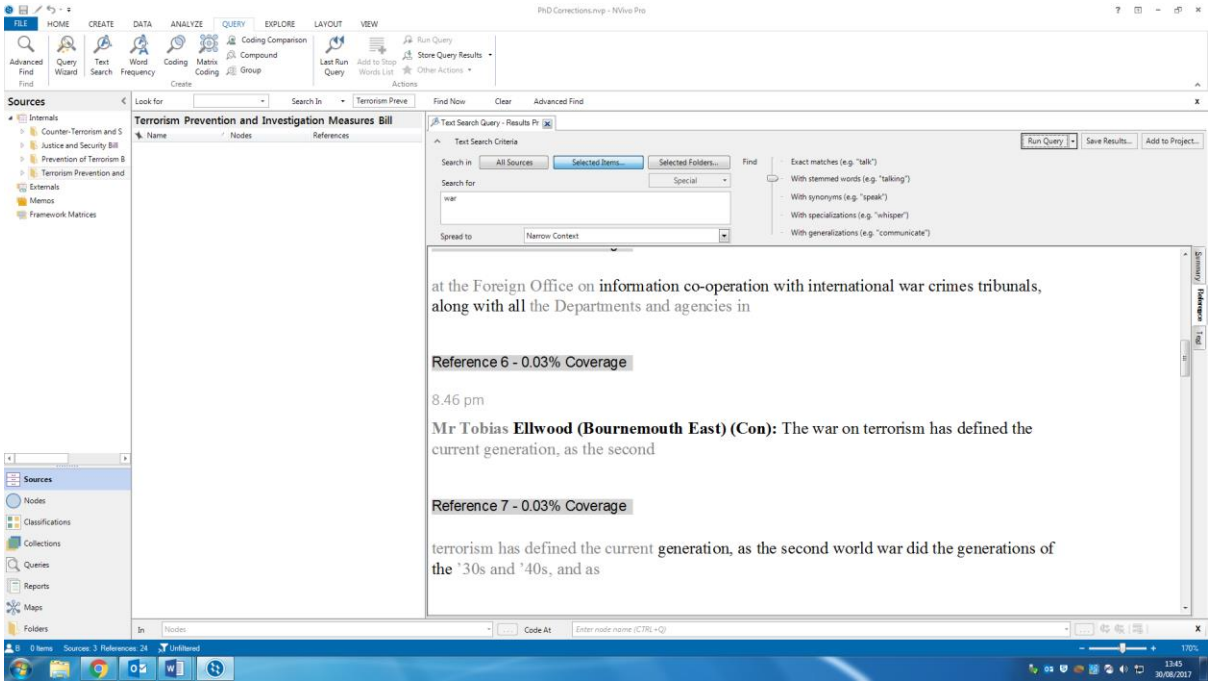
Prevention of Terrorism Bill (Second Readings and Committee Debates)



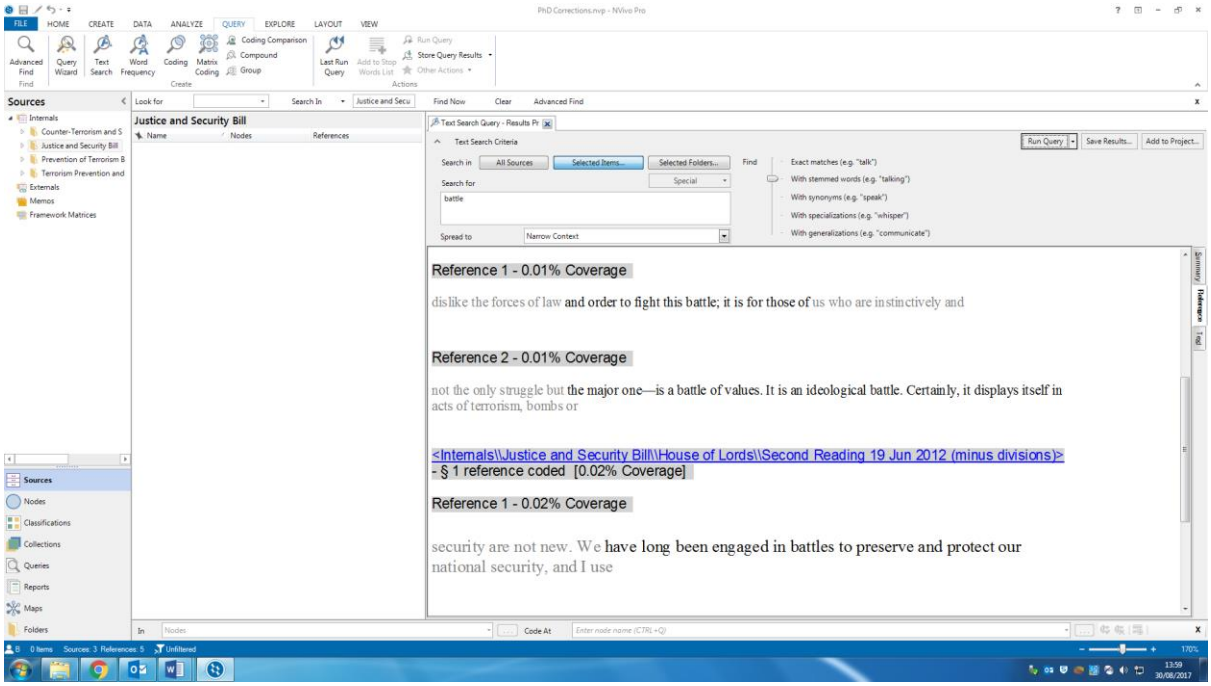


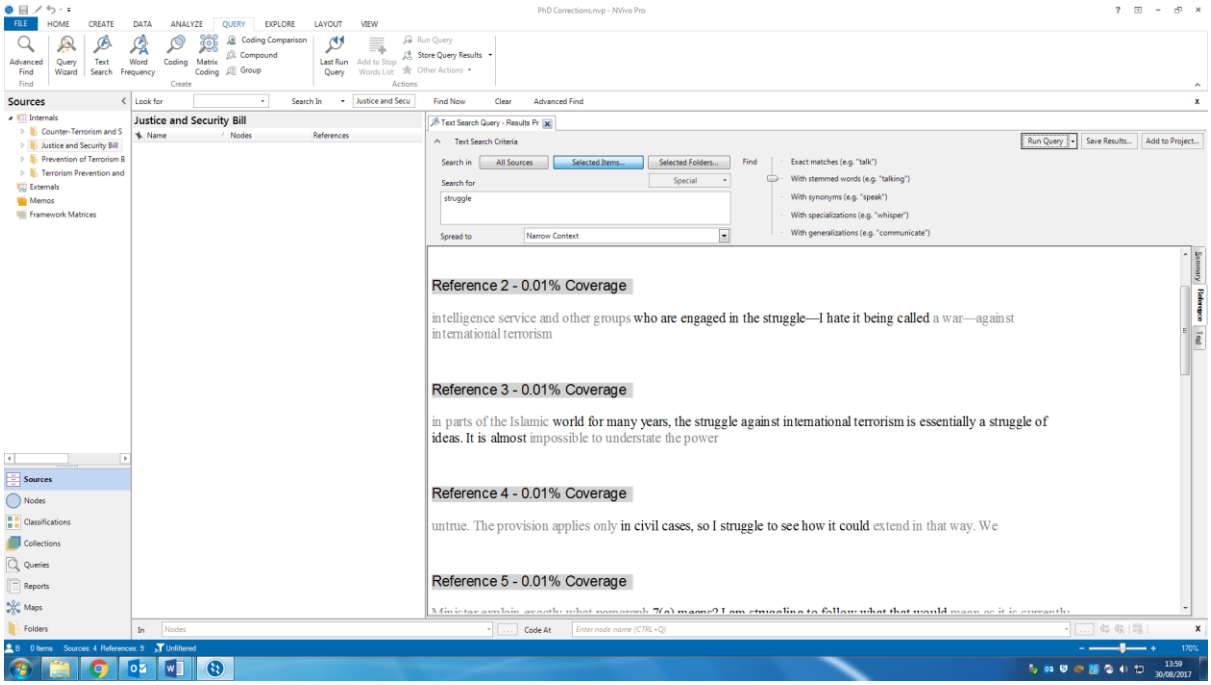
Terrorism Prevention and Investigation Measures Bill (Second Readings and Committee Debates)



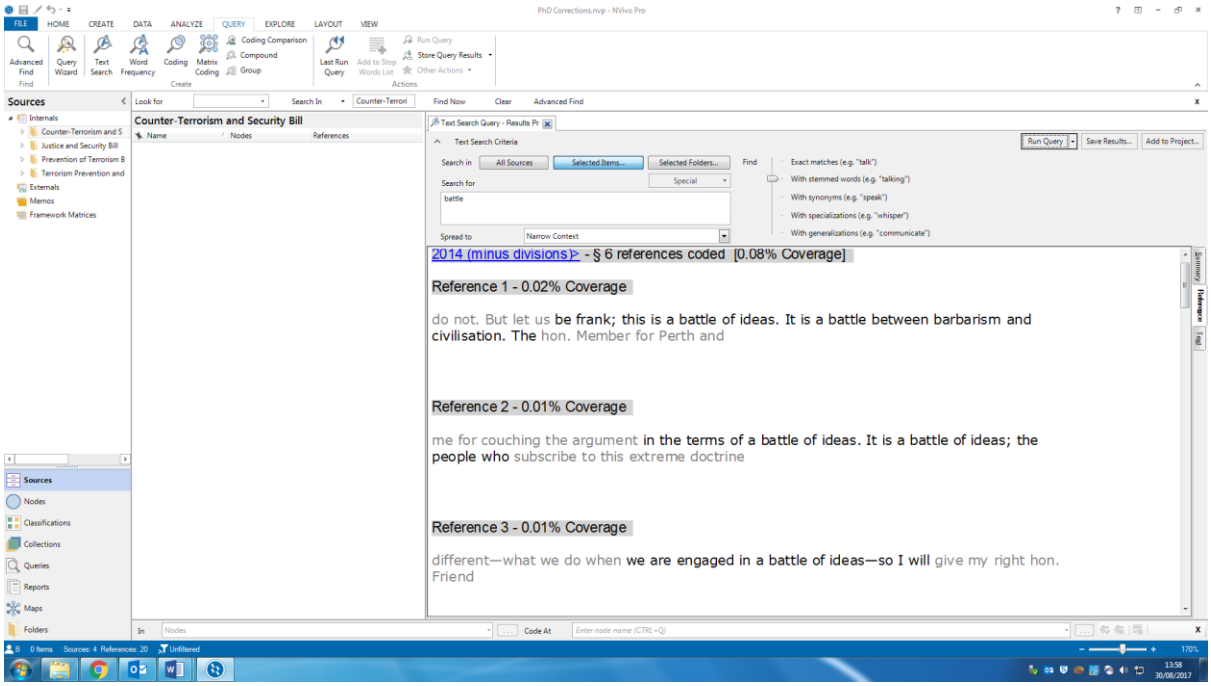


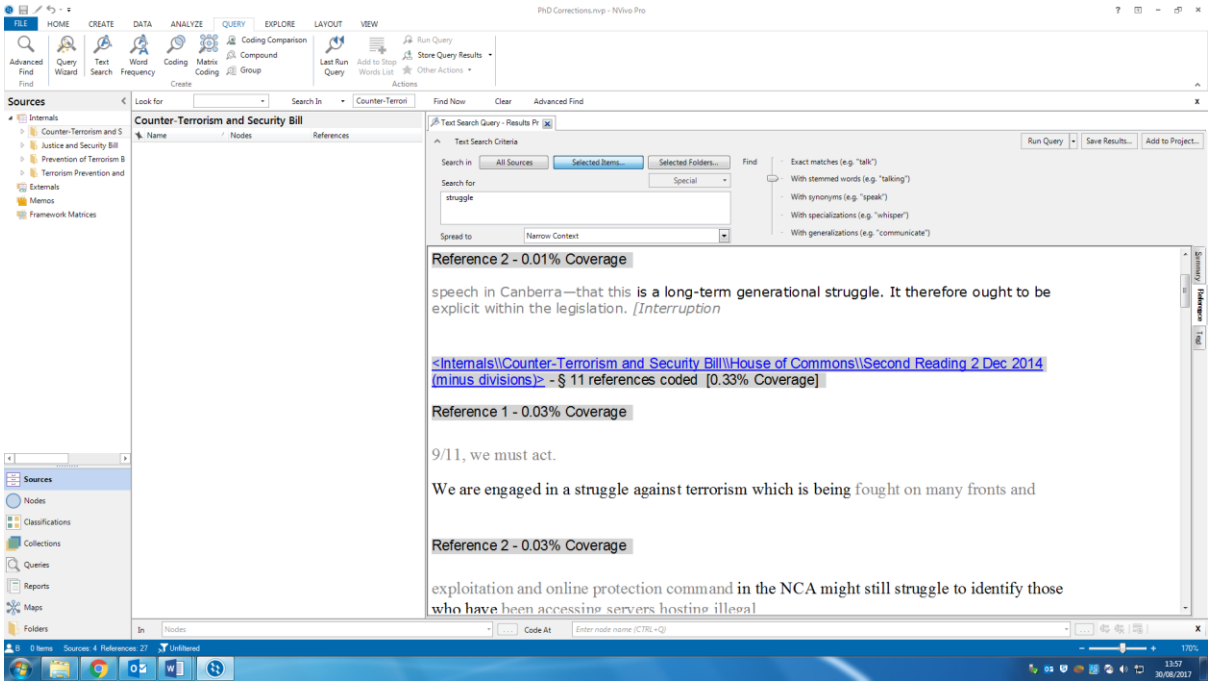
Justice and Security Bill (Second Readings and Committee Debates)





Counter-Terrorism and Security Bill (Second Readings and Committee Debates)

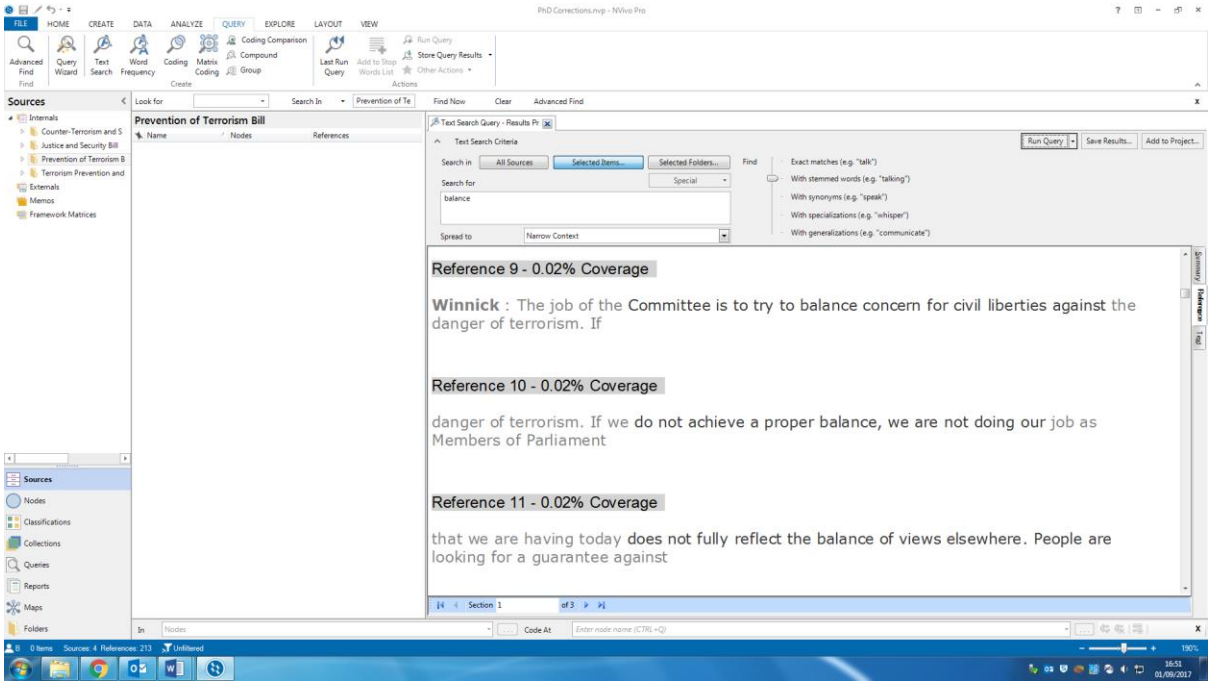


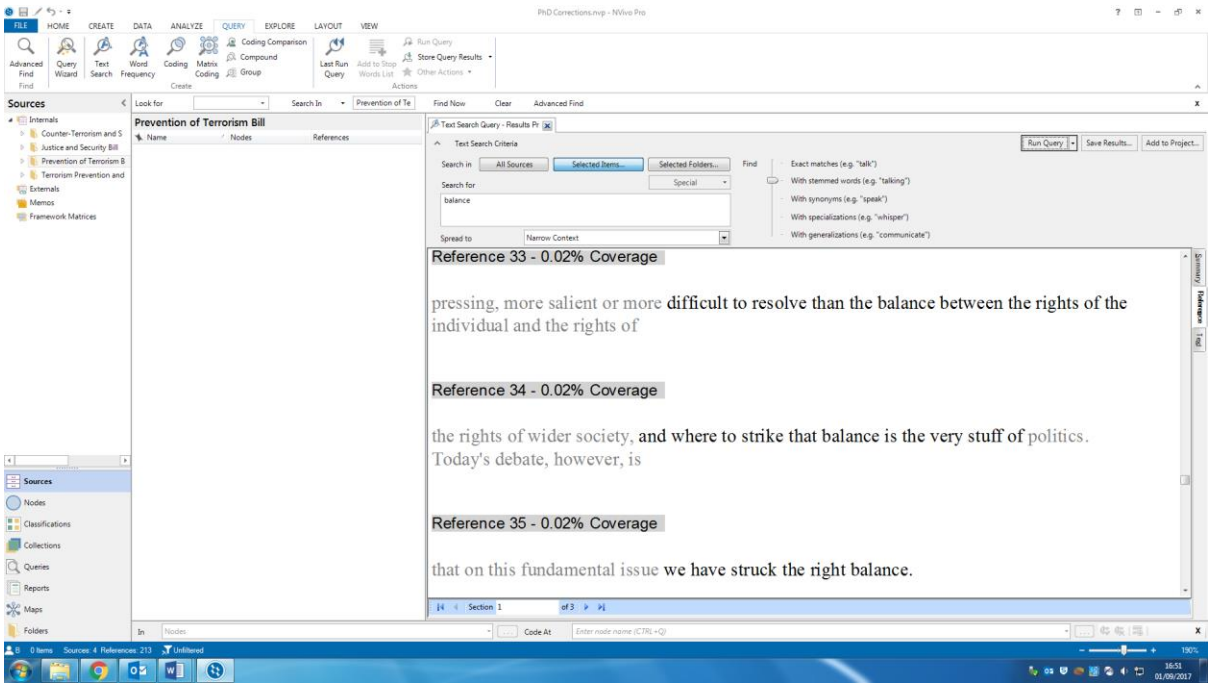


Query 3: The Notion of ‘Balance’ Between the Rights of an Individual and Society

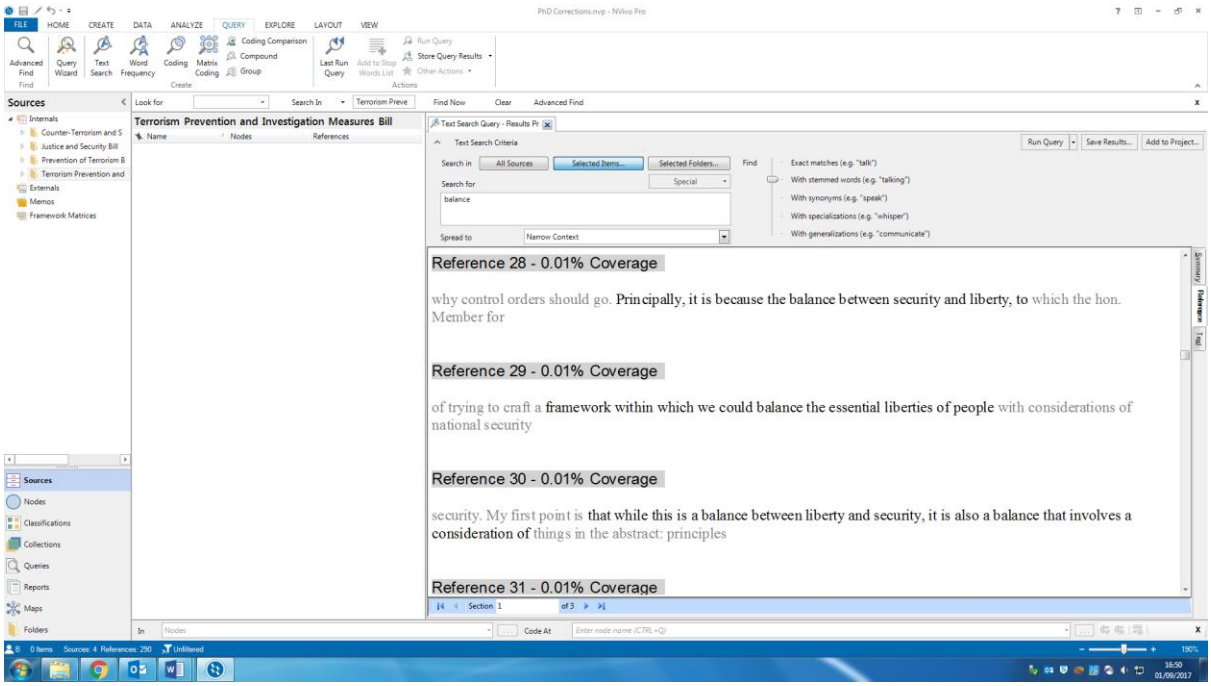
The purpose of Query 3 was to explore the perceived and often discussed conflicts between the rights of an individual and the rights of wider society. The text search tool within the Nvivo Query Wizard was used to identify instances in which the notions of a ‘balance’ or ‘balancing’ were mentioned, and stems of each word. Each reference was then manually analysed to find examples of when the notions of ‘balance’ or ‘balancing’ were used to describe the perceived conflicts between rights of individuals and the rights of wider society. Illustrative examples are included below and the results were transposed into Figure VI in Chapter 4, section 4.4.3.

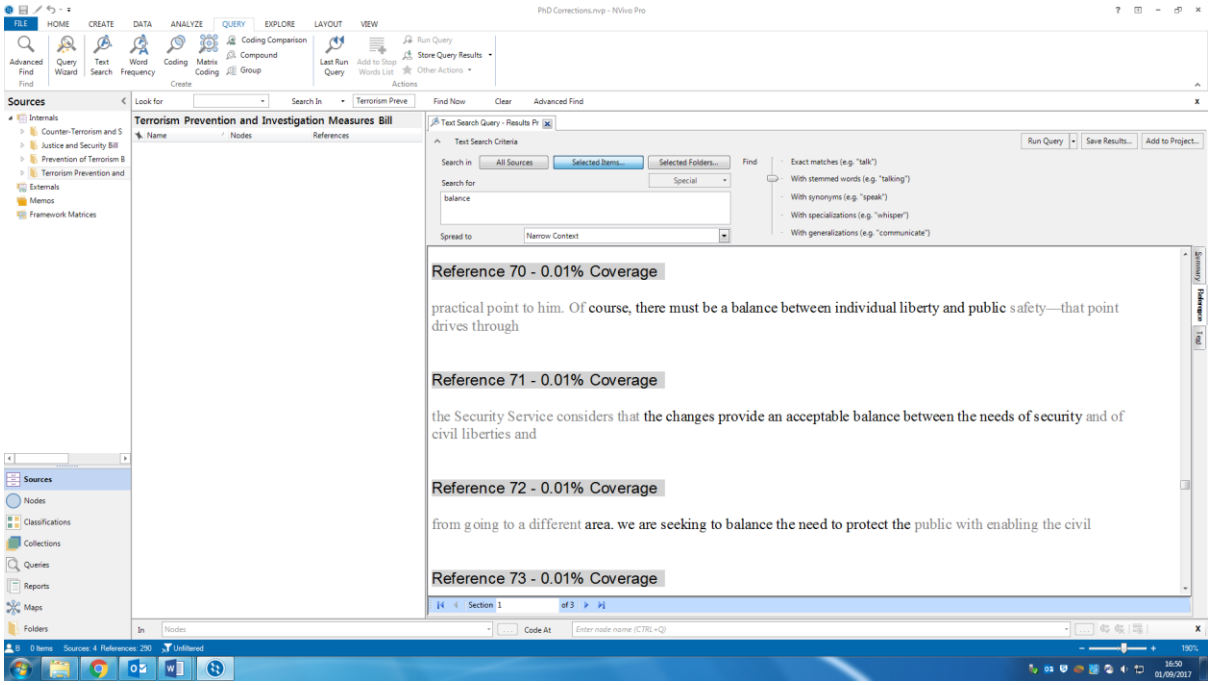
Prevention of Terrorism Bill (Second Readings and Committee Debates)



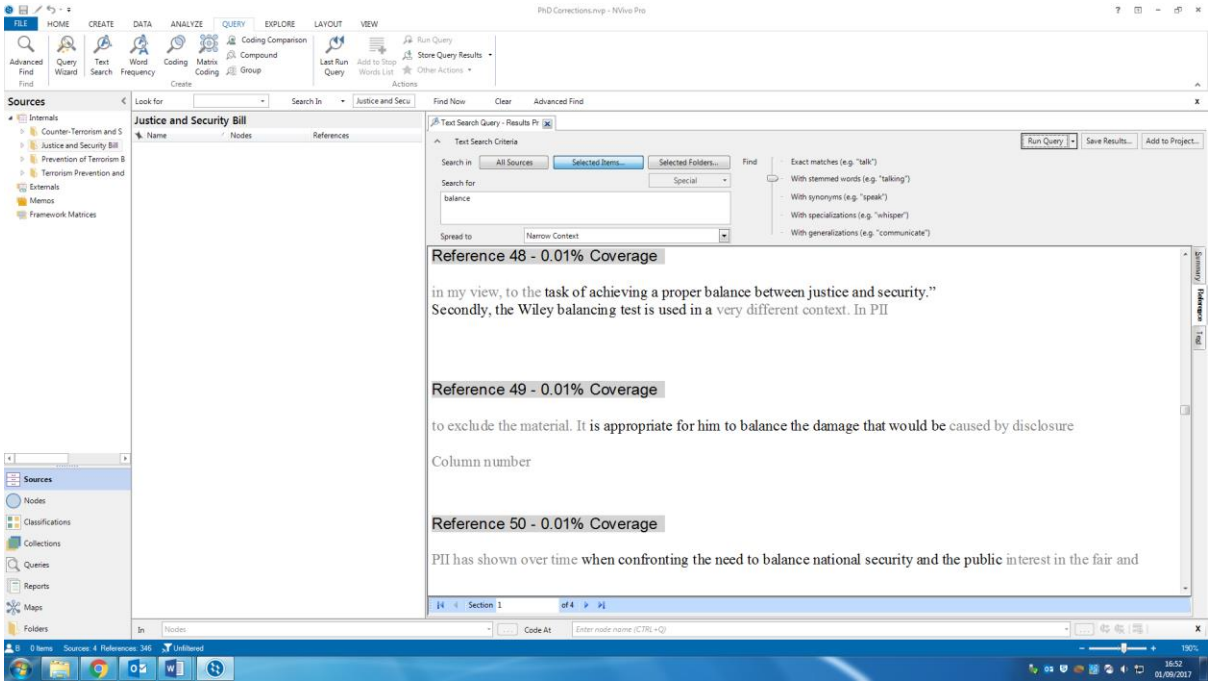


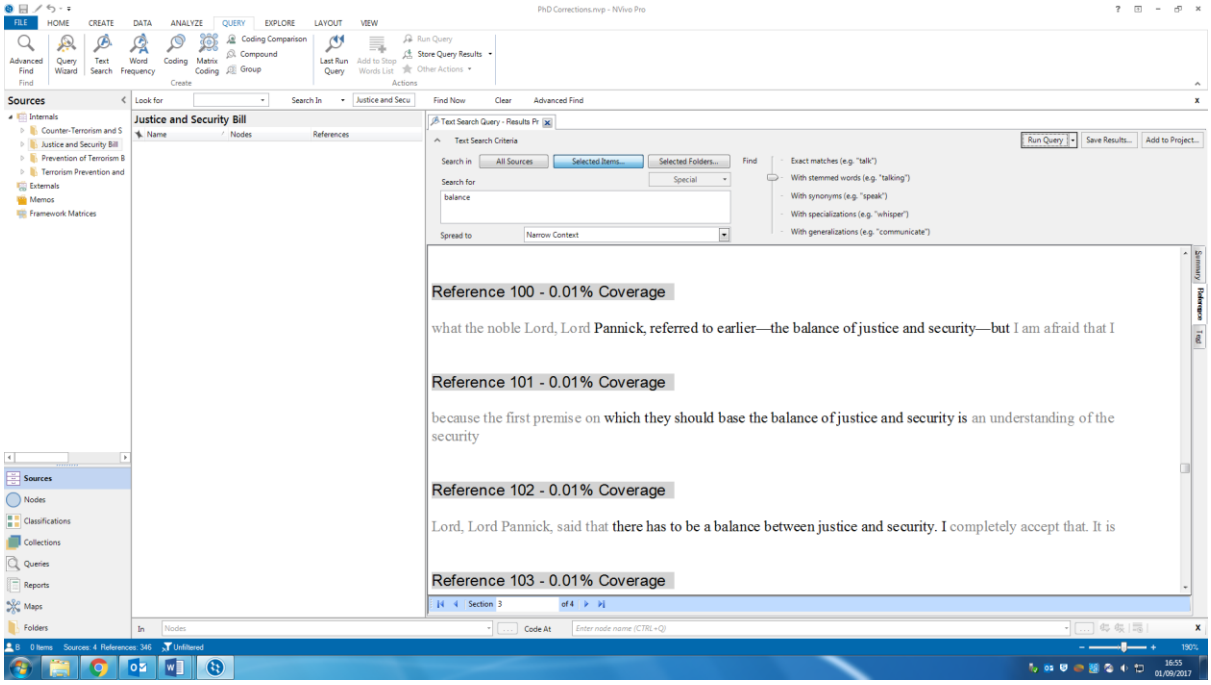
Terrorism Prevention and Investigation Measures Bill (Second Readings and Committee Debates)



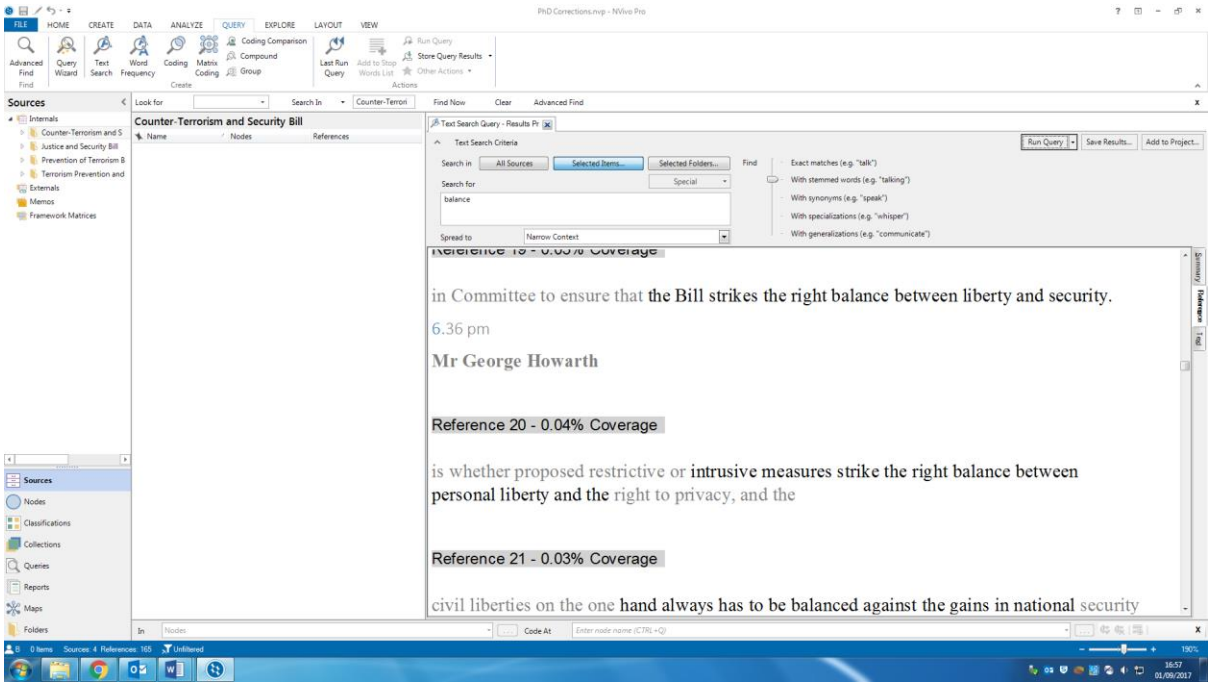


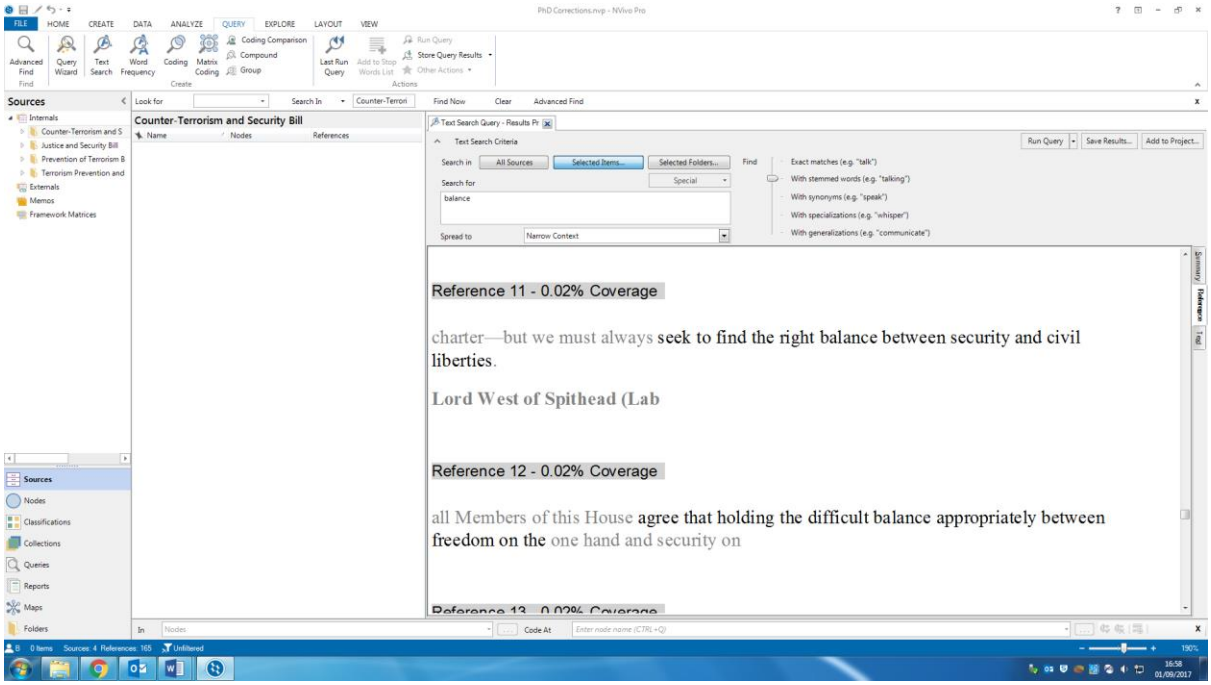
Justice and Security Bill (Second Readings and Committee Debates)





Counter-Terrorism and Security Bill (Second Readings and Committee Debates)

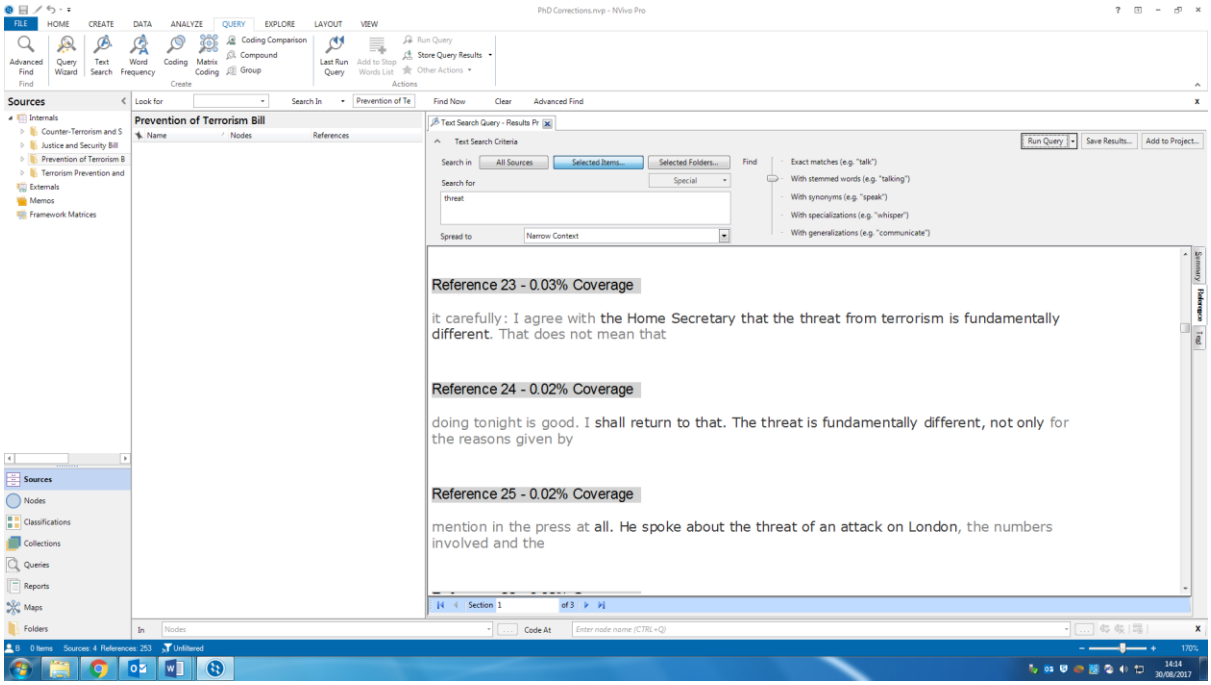


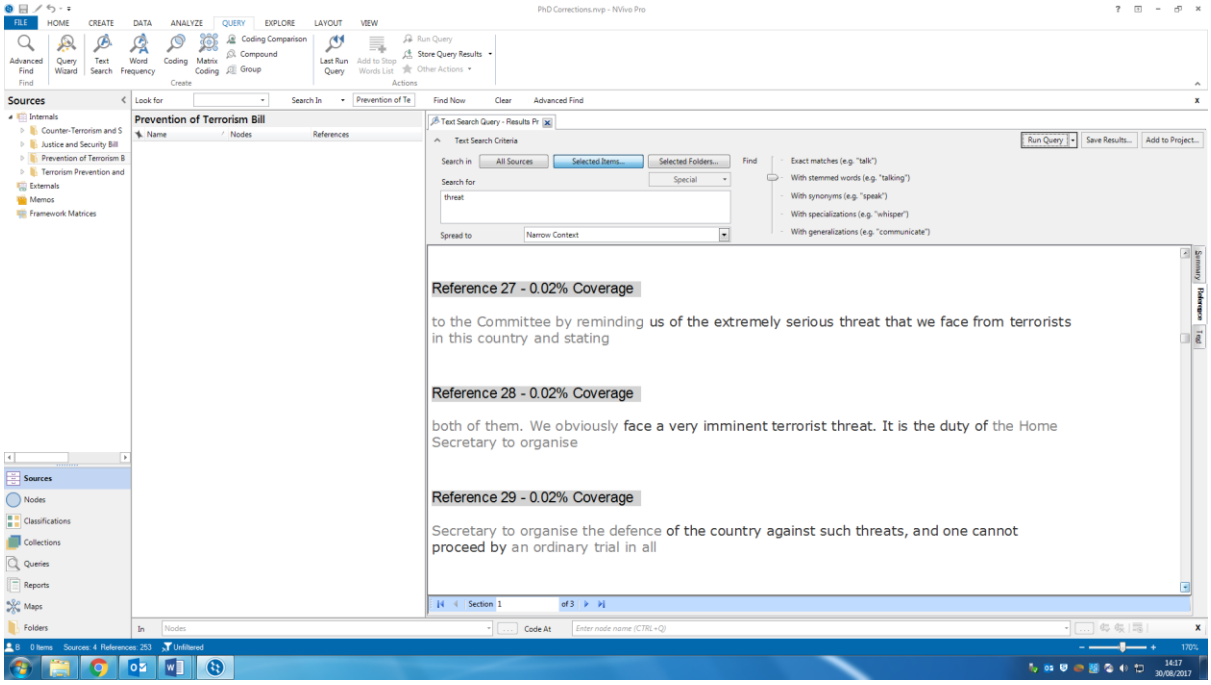


Query 4: The Nature of the Terrorist Threat

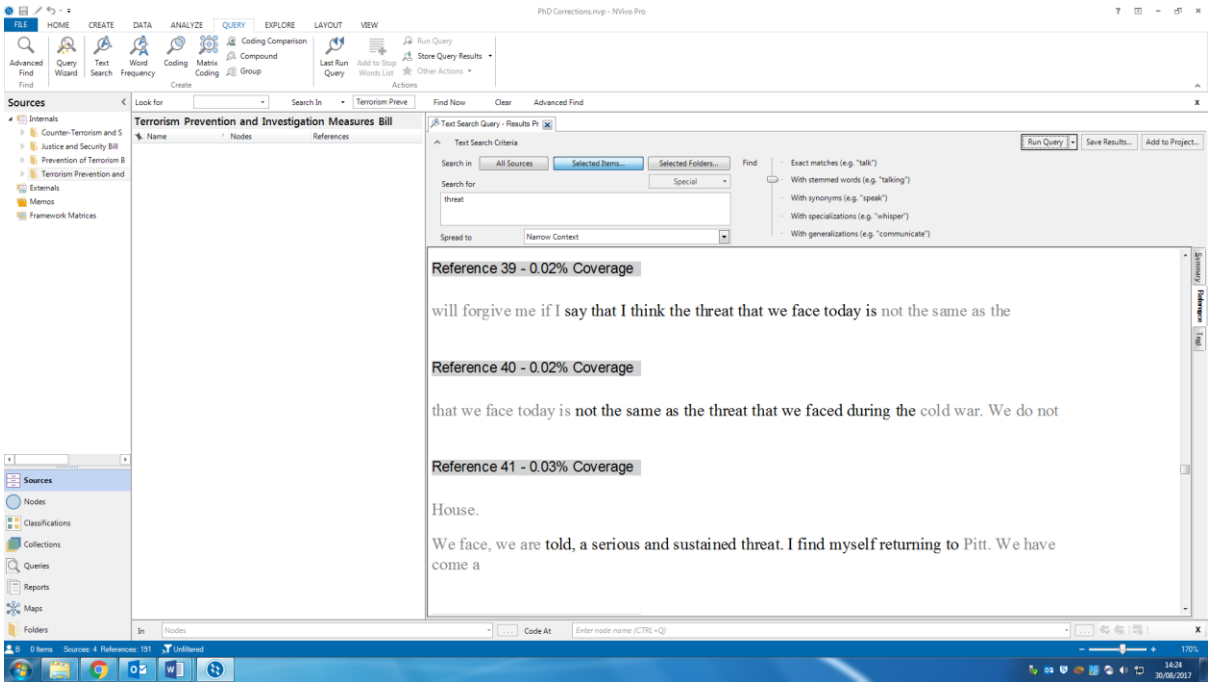
The purpose of Query 4 was to consider the nature of the terrorist threat and how it was perceived and described by parliamentarians. The text search tool within the Nvivo Query Wizard was used to identify instances in which the notion of a terrorist 'threat' was mentioned, including stemmed words such as 'threatens' and 'threatening'. Each reference was then individually considered to find examples of when the threat was described as being qualitatively different to previous threats (i.e. that the threat was evolving, different or unique), and how often the gravity of the terrorist threat was emphasised (i.e. that the threat was grave, serious or severe). Illustrative examples are included below and the results were transposed into Figure VII in Chapter 4, section 4.4.3.

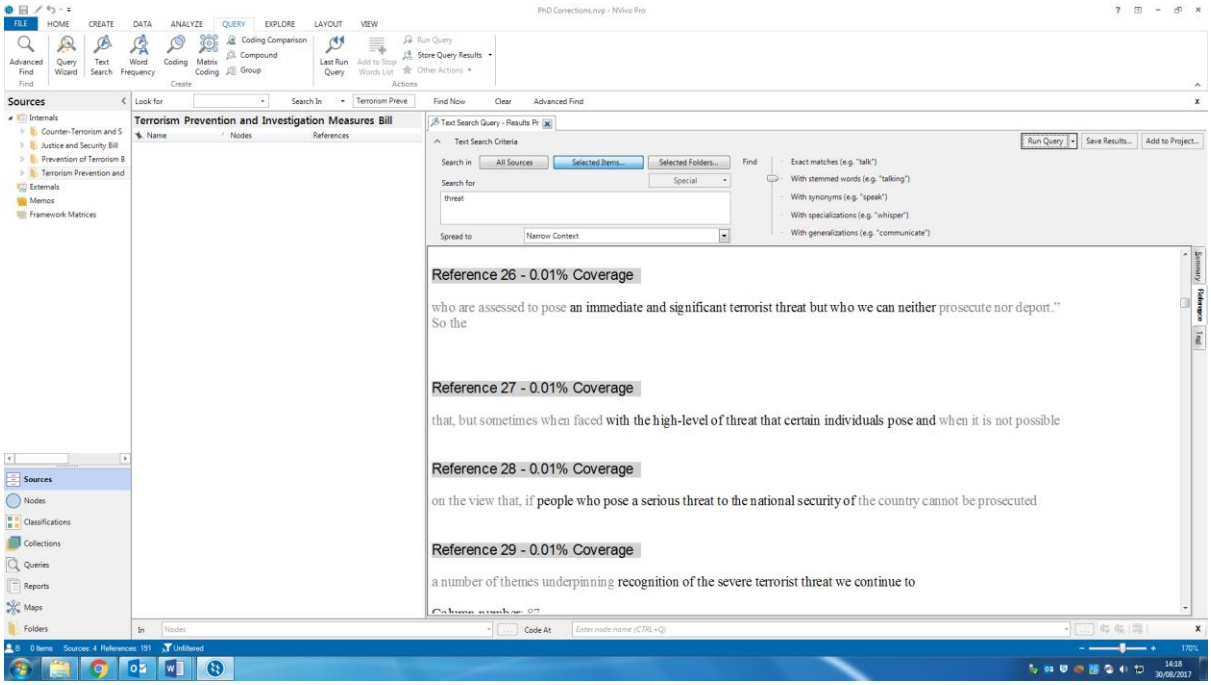
Prevention of Terrorism Bill (Second Readings and Committee Debates)



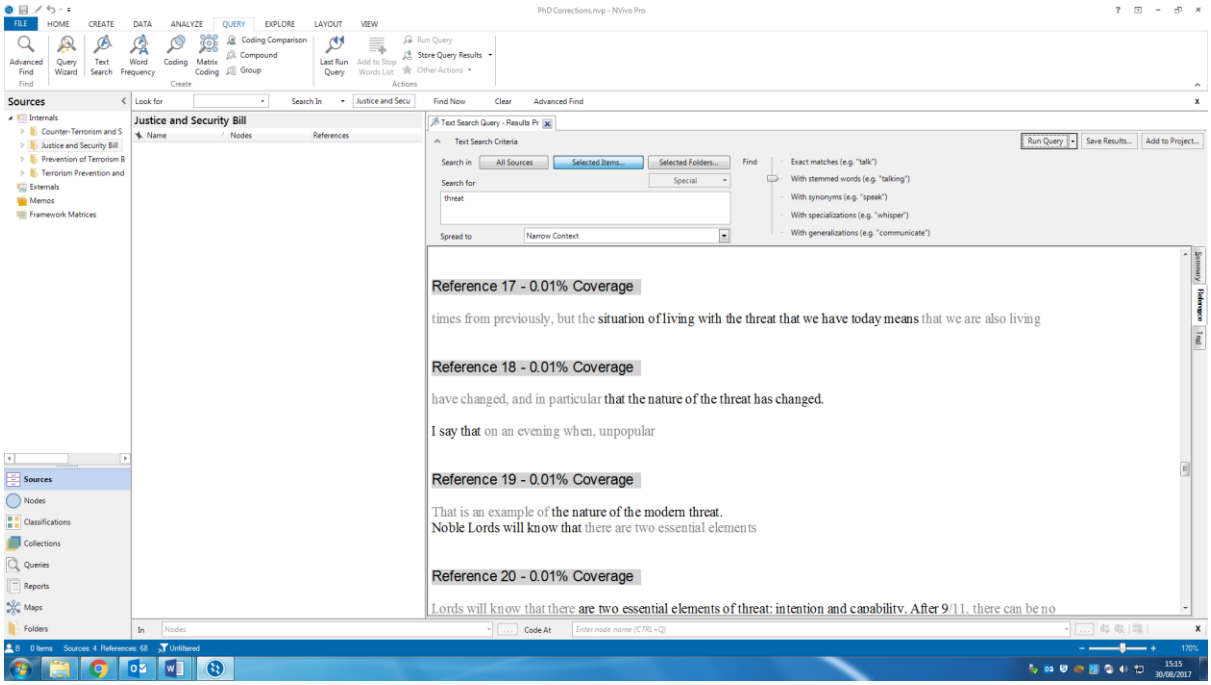


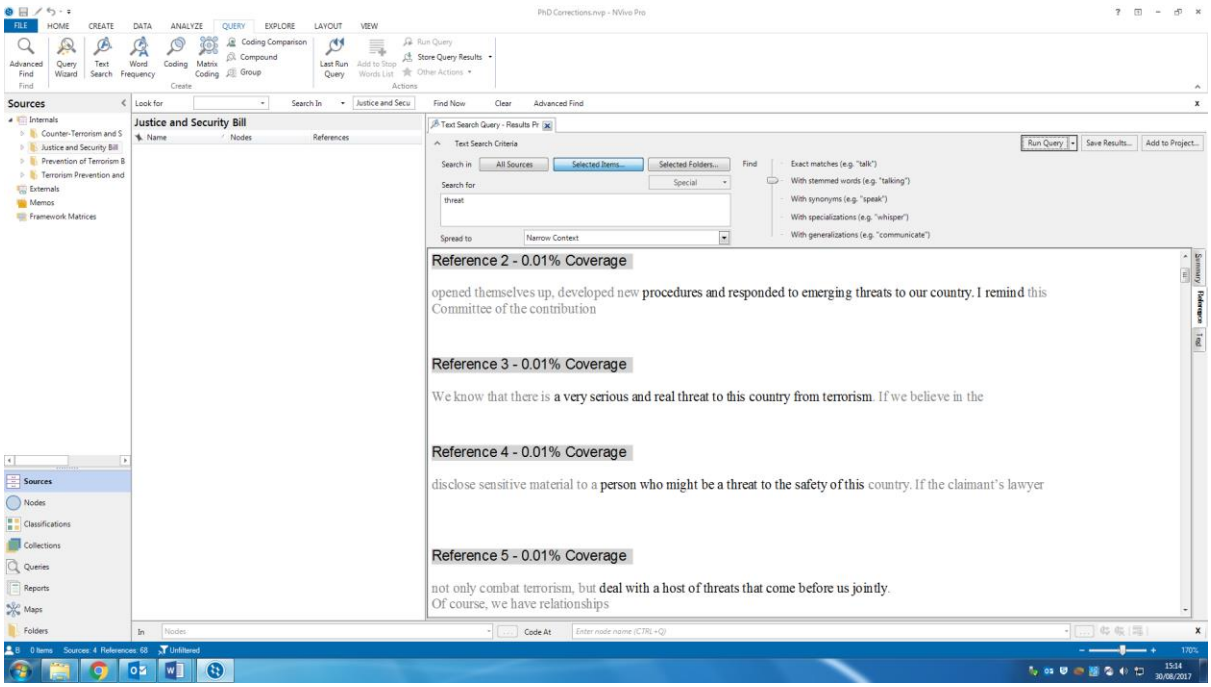
Terrorism Prevention and Investigation Measures Bill (Second Readings and Committee Debates)





Justice and Security Bill (Second Readings and Committee Debates)





Counter-Terrorism and Security Bill (Second Readings and Committee Debates)